

Navinkumar Pandu Jatot vs The State Of Maharashtra on 31 January, 2022

Author: Prakash D. Naik

Bench: Prakash D. Naik

02-BA-301-2020-with-3505-2019with-3506-2019

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION

BAIL APPLICATION NO. 301 OF 2020

Navinkumar Pandu Jatot
Aged : 24 Years Occ : Farmer,
R/o Durajpalli Ramkottanda
Dist. Nalgunda, Telangana
(At present in Judicial Custody at Yerwada
Jail)

...Applicant

Versus

State of Maharashtra

...Respondent

WITH
BAIL APPLICATION NO. 3505 OF 2019

Umesh Laxman Gaikwad
(An adult, Indian National)
Aged : 29 Years Occ : Business,
R/o Piti, Tal Patoda,
Dist. Beed
(At present in Pune Jail)

...Applicant

Versus

State of Maharashtra

...Respondent

WITH
BAIL APPLICATION NO. 3506 OF 2019

Anil Raju Gaikwad
(An adult, Indian National)
Aged : 24 Years Occ : Business,
R/o Takar Colony, Tandulwadi
Tal : Baramati, Dist. Pune

(At present in Pune Jail)

...Applicant

Versus

State of Maharashtra

...Respondent

Sajakali Jamadar

1 of 59

02-BA-301-2020-with-3505-2019with-3506-

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Mr. Aniket Nikam i/by Mr. Vivek N. Arote, Advocate for the Applicant in Bail Application No.301 of 2020.

Mr. Vishal Rankhambe with Mr. J. K. Agarwal, Advocate for the Applicants in Bail Application Nos. 3505 of 2019 and 3506 of 2019.

Mr. R. M. Pethe, APP for the Respondent - State.

Ms. Shendge (WAPI) and Mr. Khandekar (PC), Baramati Taluka Police Station, Pune Rural, Present.

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CORAM	:	PRAKASH D. NAIK, J.
ORDER RESERVED ON	:	9th SEPTEMBER, 2021.
ORDER PRONOUNCED ON	:	31st JANUARY, 2022.

ORDER :

1 The applicants in all these applications are seeking bail in connection with C.R. No. 528 of 2019 registered with Baramati Taluka Police Station, Pune on 19th June, 2019 for offences punishable under Sections 20(b) and 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short "NDPS Act").

2 The case of the prosecution is as follows :-

The First Information Report (for short "FIR") is lodged by Sachin Babanrao Patre, Police Sub Inspector, attached to Baramati Taluka Police Station, Pune Rural. On 19th June, 2019 at about 1.45 a.m. the complainant and others Sajakali Jamadar 2 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc were discharging their duty of Nakabandi at Bhigwan Road Toll Naka. At that time they noticed Maruti Suzuki Ertiga Car proceeding from Baramati to Bhigwan. 5 persons were sitting in the car. They were stopped. The inmates of the car disclosed their names as Naveenkumar Pandu Jatu, Kishan Naik, Rakesh Lawati, Umesh Gaikwad and Anil Gaikwad. On suspecting their movements, search of car was conducted. Below the rear seat of the car 20 boxes were found lying. On opening the said boxes it was noticed that boxes

were containing green leaves, sticks, seeds bearing strong smell. The police party felt that it was Ganja and hence inquiry was made with persons sitting in the car. They gave evasive answers and did not disclose any information. It was decided to initiate action under the NDPS Act. Information was given to Sub Divisional Police Officer and obtaining written permission from him. The panch witnesses, photographer were summoned at the place of incident. Personal search of the persons in the car was conducted. Inquiry was made with the said persons. They were informed about purpose of search. They were also appraised about the fact that search can be conducted in the presence of any other Gazetted Officer or Magistrate which was declined by them. 20 boxes found in the car were containing the leaves, sticks, seeds having strong smell and it was confirmed that the contents of Sajakali Jamadar 3 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc the boxes were Ganja. The contraband was seized. The weight of the contraband was 42.642 Kgm. Net weight of Ganja 41.100 Kgm. and the value was Rs.5,82,200/-. The samples were obtained and the contraband was seized and sealed. The accused were arrested on 19th June, 2019. They were remanded to custody.

3 The applicants preferred applications for bail under Section 167(2) of Cr.P.C. on 5th December, 2019, on the ground that charge-sheet is filed without C.A. report. It is incomplete charge-sheet and the appellants are entitled to be released on bail under Section 167(2) of Cr.P.C. The applications were rejected by order dated 05th December, 2019. 4 The common grounds urged by the applicants in all these applications are as follows :-

(a) The applicants are entitled for bail under Section 167(2) of Cr.P.C. r/w Section 36-A(4) of the NDPS Act.

(b) The Investigating Officer has filed the charge-sheet before the trial Court without the report of Chemical Analyzer (for short "CA"). The accused are charged for offences under the NDPS Act. The CA report determines whether the contraband is Narcotic Drugs or Psychotropic Sajakali Jamadar 4 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Drugs. Charge-sheet filed sans CA report is incomplete charge-sheet.

(c) Field test was not conducted in the present case to determine prima facie that the contraband seized from the accused was covered under the provisions of NDPS Act.

(d) The Investigating agency filed charge-sheet without C.A. report. Since the C.A. report was not available, it was open for investigation agency to seek extension of time to complete investigation on expiry of period of 180 days in accordance with Section 36 A (4) of N.D.P.S. Act.

(e) The Special Court under the NDPS Act has wrongly rejected the application for bail by ignoring the statutory right of the accused under the aforesaid provisions.

5 Learned Advocate Mr. Nikam submitted that field test was not conducted in the present case. While filing charge- sheet there was no cogent material on record to determine that the contraband seized is covered under the provisions of NDPS Act. The investigating agency cannot file charge-sheet on the basis of inferences. The CA report was not filed along with charge-sheet, thus, in complete charge-sheet was filed against Sajakali Jamadar 5 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc the accused. The applicants were entitled for default bail. He relied on the order dated 23rd March, 2017, passed by this Court in the case of Manik Sahebrao Chowgule Vs. State of Maharashtra, passed in Bail Application No.241 of 2017 (Coram Mrs.Mridula Bhatkar, J.). The ground that charge-sheet was filed without C.A.report. It is submitted that this Court relied upon two decisions of this Court in the case of Sunil Vasantrao Phulbande V/s. State of Maharashtra 2002 (3) Mh.L.J. 689 and Ranjeet Manohar Machrekar V/s. State of Maharashtra passed in Criminal Bail Application No. 509 of 2014. In those cases bail was granted to the accused on the ground that charge - sheet was filed without C.A. report. There was no report of field testing kit. Hence, the accused was entitled for bail in accordance with Section 167(2) of Cr.P.C. The case of Rafael Palafox Garcia Vs. Union of India and Anr.¹ was distinguished on the ground that there was already report of field testing kit. It is further submitted that this Court in the case of Sagar Parshuram Joshi Vs. State of Maharashtra vide order dated 15th January, 2021, passed in Bail Application Stamp No.4761 of 2020 (Coram : S.K. Shinde, J.) was pleased to grant bail on the ground that the report of field test was not part of charge- sheet, although test was conducted on the field drug kit and 1 2009 Cr.L.J.446 Sajakali Jamadar 6 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc resultant colour pattern confirmed and matched suspect substance i.e. amphetamine recovered from the accused. He submitted that in the case of Aleksander Kurganov Vs. State and Another², this Court vide order dated 5 th February, 2021, rejected similar submission by relying upon decision of Supreme Court in the case of Dinesh Dalmia Vs. CBI 3. The Court has not considered the decision in the case of Manik Chowgule (Supra) and Sagar Joshi (Supra). Thereafter in the case of Manas Krishna T.K. Vs. State⁴, this Court (Coram : M.S. Jawalkar, J.) vide order dated 7th July, 2021, noted decisions in the case of Sagar Joshi and Aleksander Kurganov and referred the issue to the larger bench. It is submitted that, the decision in the case of Dinesh Dalmia was not relating to offences under the NDPS wherein C.A. report is vital document. In the case of Aleksander Kurganov V/s. State of Maharashtra, field test was conducted.

6 The submissions of learned Advocate Mr. Vishal Rankhambe appearing in Bail Application Nos. 3505 of 2019 and 3506 of 2019 are similar.

7 Learned APP Mr. Pethe submitted that the samples

2 2021 SCC Online Bom 150

3 AIR 2008 SC 78

4 2021 SCC Online Bom 1015

Sajakali Jamadar

7 of 59

02-BA-301-2020-with-3505-2019with-3506-2019.doc were forwarded to the forensic expert seeking opinion on 2 nd August, 2019. Reminder was sent to the Chemical Analyzer on 9th January, 2020. The report was ready on 28th August, 2019. It was received by police Inspector Baramati police station vide letter dated 17th January, 2020, the police inspector Baramati Police station forwarded the report to trial Court. It is taken on record on 30th January, 2020. The CA report was received on 17th January, 2020. It has been produced before the trial Court and forms the part of the said proceedings. He further submitted that, even if the charge-sheet was filed without CA report, the present case can be distinguished on the basis of the fact that the accused were found in possession of Ganja. It was possible for the investigating officer to determine nature of contraband on the basis of smell and its features. Mr. Pethe drew my attention to the observations made by this Court in the case of Sagar Joshi (supra) wherein reference was made to the handbook and the Chapter VII of the said handbook which relates 'Drug identification and Field Testing'. It was observed that the chapter I enumerates, check list for Drugs Law Enforcement Officers, while executing the field operation, to ensure that Drug Law Enforcement Officer does not overlook anything, which might subsequently affect the case. Reference was made to item no.10 in the check list, wherein it is Sajakali Jamadar 8 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc mentioned that where all recovered suspect substance field tested with drug detection kits precursor testing kits and matching colour results to show presence of Narcotics Drugs or Psychotropic Substance or Control Substance and was it all documented? The chapter relating to identification of drug states that natural narcotic drugs like Ganja, Charas, Opium Poppy can be easily identified by their colour, texture and smell. Mr. Pethe submitted that Ganja is such substance which can be identified easily by the investigating agency and there was reason to believe that the contraband found in possession of the applicants herein was covered under the provisions of NDPS Act. Mr. Pethe further submitted that even otherwise the ground for bail under Section 167(2) of Cr.P.C. were not available to the applicants. The charge-sheet without CA report cannot be termed as incomplete charge-sheet. He relied upon the decisions of this Court in the case of Aleksander Kurganov Vs. State and Another (supra) and decision in the case of Dinesh Dalmiya V/s. C.B.I. (Supra). It is submitted that, in the light of the observations made in the case of Dinesh Dalmiya (supra) the charge-sheet sans CA report cannot be said to be incomplete charge-sheet. Mr. Pethe has also relied upon the decision of the Kerala High Court dated 8 th September, 2021 delivered in the case of S a m e e r V / s . S t a t e o f S a j a k a l i J a m a d a r 9 o f 5 9 02-BA-301-2020-with-3505-2019with-3506-2019.doc Kerla. He submitted that, in the said decision it was held that the investigating officer has already initiated proceedings to get analyst report by submitting appropriate requisition before the Court and simply because the analyst report is not received from the laboratory the investigation cannot be held incomplete. The application for bail in the present case was filed before completing of 180 days and it was rejected by Special Court.

8 Mr. Nikam in rejoinder submitted that the proceedings under the NDPS Act are required to be distinguished since the conviction of the accused would be based on the fact that he was involved in possession, transportation etc., of Narcotic Drugs or psychotropic substance. The CA report is a determinating factor. Although application for bail under Section 167 (2) was preferred on 5 th December, 2019, the investigating agency had not filed CA report within 180 days, nor there was extension sought for completion of investigation. The right had accrued in favour of applicants and the present applications were filed and pending before this Court when such right to default bail had

accrued in favour of applicants.

Sajakali Jamadar 10 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc 9 After concluding the submissions of both sides and the order was reserved, Mr. Nikam has mentioned that reference made by this Court in the case of Manas Krishna T.K. (supra) was answered by the Division Bench of this Court and placed for consideration the decision of the Division Bench of this Court (Goa Bench) dated 17th September, 2021. However, he mentioned that the facts of the case under reference, indicate that field test was conducted but C.A. report was not filed along with charge-sheet. It was filed beyond 180 days. 10 The applicants were arrested on 19th June, 2019. Charge-sheet was filed on 11th August, 2019. The letter to CA seeking opinion about the samples was forwarded on 2nd August, 2019. The CA Report dated 28th August, 2019, was received and it is part of proceedings. The documents submitted by learned APP indicate that report dated 17th January, 2020, was submitted to trial Court on 30th January, 2020, requesting that the C.A. report dated 28th August, 2019, is received. Charge-sheet is already filed against accused and the report be included in the proceedings. The learned APP from trial Court has acknowledged it with signature on 30th January, 2020. There is another report dated 8th February, 2021, by police inspector Baramati Taluka police station submitted to trial Sajakali Jamadar 11 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Court for including C.A. report in case papers. The said report is marked as Exhibit-22, and it bears order dated 8th February, 2021 as, "Allowed".

11 The FIR dated 19th June, 2019 indicate that search of boxes resulted in green leaves, seeds having strong smell determined by the raiding party as Ganja. Panchanama of seizure was recorded on 19th June, 2019. The panchanama indicate that the Investigating Officers' were of the opinion that the contraband was Ganja. Statement of Police Head Constable Jayant Takawane dated 19th June, 2019 mention that on opening the boxes, the officers noticed green leaves, sticks and seeds having strong smell and it was revealed that boxes were containing Ganja. Statements of Police Head Constable Rajendra Jadhav, Police Constable-Ranjeet Mulik, Police Naik- Sandip Jahdave, Police Head Constable-Surendra Wagh, Police Naik - Swapnil Ahiwale, Police Constable-Sharma Pawar, Police Constable-Vishwal Jawale are similar. All the statements forms part of charge-sheet which has been filed before the Court. 12 It is undisputed that the charge-sheet was not accompanying the CA report. Charge-sheet was filed before 180 days. C.A. report was submitted to trial Court beyond 180 days.

Sajakali Jamadar 12 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Specimen was sent to C.A. for analysis on 2nd August, 2019. The report states that what was recovered from the accused is Ganja.

13 It is urged in these applications that the charge-sheet filed without CA report is incomplete charge-sheet. The field test was not conducted. Hence, the applicants/accused were entitled for bail under Section 167(2) of Cr.P.C. r/w Section 36-A(4) of the NDPS Act.

14 The decision in the case of Sunil Phulbande and Anr. (Supra) was decided on 13th February, 2002. It was held that charge-sheet for offences under N.D.P.S. Act against the applicants therein

without chemical analysers report is incomplete. Such incomplete charge-sheet cannot be said to be charge-sheet contemplated under Section 173(5) so as to enable the Magistrate to take cognizance of the offence. The applicants were entitled to be released on bail for non compliance of provisions of Section 167(2) of Cr.P.C. This Court relied on decision of Andhra Pradesh High Court in Matchumari China Venkatreddy and Others Vs. State of Andhra Pradesh⁵, and judgment of this Court in the case of Sharadchandra Vinayak Dongre and Ors. Vs. State of 5 1994 Cr.L.J.257 Sajakali Jamadar 13 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Maharashtra6.

15 In the case of Manik Sahebrao Chowgule (Supra), this Court has held that charge-sheet without C.A. report is incomplete and accused is entitled for bail. The facts of that case were that the recovered contraband was Ganja. Field test was not conducted and C.A. report was not filed with charge- sheet. Bail was granted under Section 167(2) of Cr.P.C. The reliance was placed on decision in the case of Sunil Phulbande (Supra), and Ranjeet Manohar Machrekar Vs. State of Maharashtra (Criminal Bail Application No.509 of 2014). This Court distinguished decision of this Court in the case of Rafael Palafox Garcia Vs. Union of India and Another 7, on the ground that in that case samples were tested on the spot by field testing kit and the report was positive for controlled substance under N.D.P.S. Act.

16 In another order passed by this Court in the case of Sagar Joshi (Supra) dated 15th January, 2021, reference was made to the handbook about 'Drug identification and Field Testing'. In that case test was conducted by field drug kit and the resultant colour pattern confirmed and matched with 6 1991(1) Mh.L.J.656.

7 2009 Cr.L.J. 446

Sajakali Jamadar

14 of 59

02-BA-301-2020-with-3505-2019with-3506-2019.doc amphetamine recovered from the accused. However, the documents relating to the field test reports of suspect substances were not part of charge-sheet. Bare reference in the panchanama of test being conducted was not sufficient to show that suspect substance was amphetamine. It was observed that the report of Chemical Analyzer lays the foundation of the culpability of accused without which even Magistrate cannot form an opinion and take cognizance, involvement of the accused in commission of offence under the NDPS Act. Bail was granted in accordance with Section 167(2) of Cr.P.C. reliance was placed on the decision in the case of Sunil Phulbande (Supra). Reference was made to field officers hand book issued by NCB for guidance of Drugs Law Enforcement officers and observed that, instructions in hand book suggest, preparation of test memo on the spot and facsimile in print seal used in sealing the envelopes to be affixed on test memos. The test memos were not filed on record and the officers did not take recourse to Section 36 A(4) of NDPS Act to file chemical analysers report within extended time.

17 In Balaji Vasantrao Suwarnkar Vs. State of Maharashtra⁸, this Court held that Section 167 of the Code of 8 1992 Mh.L.J.159 Sajakali Jamadar 15 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Criminal Procedure contains a necessary safeguard against prolonged detention of the person accused of cognizable offences and puts a

limitation on such detention during investigation. Investigation has been defined by Section 2(h) of the Code to include all the proceedings under the Code for the collection of evidence conducted by a police officer or by any person (other than a Magistrate) who is authorised by a Magistrate in this behalf. Investigation comes to an end as soon as a report under Section 173 is filed. This report may either be in the form of what is popularly known as charge-sheet or a final report under Section 169. Essentials of a valid report under Sub-section (2) of Section 173 have been listed in the said Sub-section. Even if any document is not filed alongwith the charge-sheet, prosecution if able to show good reason, is not precluded from submitting that document at a later stage and if sufficient opportunity is given to accused, the document can well be accepted. Merely because the chemical analysts report was not there, it was totally improper on the part of the Court to refuse to accept the charge-sheet. If all this information as is required by Section 173(2) is given in the charge-sheet, it is a proper report about completion of the enquiry and as soon as it is filed in the Court, requirement as per Section 167 is fulfilled by the prosecution. Section 167 of the Code of Criminal Procedure does not lay down that the Magistrate shall take cognizance of the offence within 90 days or 60 days, as the case may be, and if no cognizance is so taken within that period, then accused shall be entitled for release on bail. Limitation is provided for completion of investigation and not for taking cognizance by the Court consequently, the provisions of Section 167(2) proviso were not attracted.

18 In *Rohini Mahavir Godse Vs. State of Maharashtra and Others*⁹, the Division Bench of this Court held that, once the Magistrate received police report of facts which constitute a cognizable offence, the Magistrate is under an obligation to take the cognizance under Section 190(1)(b) of Cr.P.C., and, he has no discretion to refuse to take cognizance of such a case. Once the charge-sheet complies with the requirement of Section 173(2) and cognizable offence is disclosed, the Magistrate is duty bound to accept the charge-sheet. Sub-section(5) of Section 173 merely enjoins upon the police officer to forward to the Magistrate along with the report (a) all documents or relevant extracts thereof on which the prosecution proposes to rely other than those already sent to the Magistrate during the course of investigation and (b) the statements recorded under 9 1996(2) Mh.L.J.492 *Sajakali Jamadar* 17 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Section 161 of all persons whom the prosecution proposes to examine as its witnesses. However, the provisions of this Sub-section do not make report under Sub-section (2) incomplete or unacceptable if certain documents on which the provisions of Sub-section (8) of Section 173 contemplates further report or reports under Sub-section (2) to be filed even after filing of the first report under the provisions of Section 173(2) and such further report or reports shall be dealt in accordance with the provisions of Section 173(8) of Cr.P.C. where the police had filed a valid charge-sheet within the period of 90 days from the date of arrest of the accused and it was illegally rejected by the Magistrate, the accused cannot get advantage of Section 167(2) of Cr.P.C.

19 In the case of *Rafael Palafox Garcia Vs. Union of India*¹⁰, the contention of applicant was that, at the time of filing of charge-sheet, the C.A. report was not filed. Thus, incomplete charge-sheet was filed. There was no material before Court to come to the conclusion that the substance seized was pseudo-ephedrine, and, hence, could not have taken cognizance of the case. Though the charge-sheet is filed within 60 days, the same was incomplete as it was not accompanied with documents 10 2008 All MR (Cri) 3031 *Sajakali Jamadar* 18 of 59

02-BA-301-2020-with-3505-2019with-3506-2019.doc contemplated under Sub-section (5) of Section 173 of Cr.P.C., and, cannot be treated as charge-sheet/report which would empower the Court to take cognizance of the offences, and, hence, applicant is entitled to be released on bail in view of Section 167(2) of the Code. Reliance was placed on decision in the case of Sunil Phulbande (Supra). It was observed that the complaint and panchanama, specifically mention about field testing kit being taken to the spot and samples were tested and result was positive. It is held that the charge-sheet is an intimation to the Magistrate that upon investigation into a cognizable case, the investigating officer has been able to procure sufficient evidence for the Court to enquire into the offence and the necessary information is being sent to the Court. A charge-sheet is a final report within the meaning of Sub-section (2) of Section 173 of Code. It is filed as to enable Court concerned to apply mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed thereof. One of the requirement for submission of police report is whether any offence appears to have been committed and by whom. Even though the report of C.A. was not filed, it cannot be said that an incomplete charge-sheet has been filed and Court could not have taken cognizance. Accused was not entitled for bail under Sajakali Jamadar 19 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Section 167(2) of Cr.P.C.

20 The High Court of Kerala at Ernakulam in the case of Sameer Vs. State of Kerala dealt with similar issue. The final report was submitted by investigating officer in a case registered under N.D.P.S. Act, without analyst report. Hence, the accused had contended that it is an incomplete final report. The statutory period of 180 days is over. Incomplete final report is filed to defeat the right of accused to get bail under Section 167(2) of Cr.P.C. The accused is entitled for bail under Section 167(2) of Cr.P.C. The Court took a view that, as per Section 2(h) investigation includes all the proceedings under Cr.P.C., for collection of evidence conducted by a police officer or by any person (other than Magistrate), who is authorised by a Magistrate in this behalf. Therefore, the investigation includes all the proceedings under the Code for collection of evidence. The investigating officer has already taken proceedings to get the analyst report by submitting requisition before the Court concerned and it is already reached the laboratory. Therefore, it cannot be said that simply because the analyst report is not received from the laboratory, the investigation is not complete. If the investigating officer is mainly relying on lab report to prove his case, and, final report is filed without report, it cannot Sajakali Jamadar 20 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc be said that it is a final report. If the investigating officer after investigation concluded that offence against the accused is maintainable on documents submitted before the Court, it can be treated as a complete report under Section 173 of Cr.P.C. In such situation, the investigating officer can submit report before the Court that the analyst report is not received and that is supplementary evidence or corroborative evidence to move the charge-sheet. In such circumstances, it cannot be said that the final report submitted is defective. In case, where the prosecution cannot prove a case without aid of the analyst report, and if final report is filed without analyst report, it can only be treated as incomplete final report. Therefore, entitlement of default bail under Section 167 of Cr.P.C. is to be decided on the facts of each case.

21 In the case of Dinesh Dalmia Vs. CBI (Supra) , it was observed that charge-sheet is a final report within the meaning of Sub-section (2) of Section 173 of the Code. It is filed so as to enable the Court

concerned to apply its mind as to whether cognizance of the offence thereupon should be taken or not. The report is ordinarily filed in the form prescribed therefor. One of the requirement for submission of a police report is whether any offence appears to have been committed and if so, by Sajakali Jamadar 21 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc whom. In some cases, the accused having not been arrested, the investigation against him may not be complete. There may not be sufficient material for arriving at a decision that, the absconding accused is also a person by whom the offence appears to have been committed. If the investigating officer finds sufficient evidence even against such an accused who had been absconding, law does not require that filing of charge- sheet must wait the arrest of accused. The power of investigating officer to make prayer for further investigation in terms of Section 173(8) is not taken away only because charge- sheet has been filed. Further, investigation is permissible even if order of cognizance of offence has been taken by the Magistrate. It is further observed that ordinarily all documents accompany the charge-sheet. But, in that case, some documents could not be filed which were not in the possession of CBI and the same were with GEQD. (Government Examiner of Questioned Documents).

22 In Tara Singh Vs. State¹¹, the report of imperial serologist and drawing of the sketch map of the occurrence was produced by filing second challan, beyond the period prescribed under Section 167(2) of Cr.P.C. The accused claimed bail under 11 AIR 1951 SC 441 Sajakali Jamadar 22 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc Section 167(2) of Cr.P.C. on the ground that the first challan was incomplete. The submission was rejected by Court. It was held that first challan was complete, even though the report of imperial serologist or the drawing of the sketch map of the occurrence did not accompany the same. Section 173(1)(a) requires that as soon as the police investigation under Chapter XIV is complete, there should be a report forwarded to the Magistrate in the prescribed form setting forth names of parties, nature of information and names of persons who appear to be acquainted with circumstances of the case. Thus, it was complete report. In the case of Suresh Kumar Bhikam Jain (supra), decided by Hon'ble Supreme Court, a charge sheet containing the details specified in Section 173(2) had been filed within the time prescribed under Section 167(2). However, no copy of the sanction order was produced along with such a charge sheet. The accused contended that in the absence of a sanction order, the Magistrate had no authority to take cognizance of the offense or to pass any further remand orders under Section 309 and therefore the accused was entitled to default bail under Section 167(2). This contention was however negatived holding that a police report or a charge sheet containing details specified in Section 173(2) had been filed within the period stipulated under Section 167(2) and the issue Sajakali Jamadar 23 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc of cognizance was to be addressed later. The police report was complete even though the sanction order was not accompanying it, and therefore, the accused was not entitled to default bail. In this case the Hon'ble Supreme Court considered its several earlier rulings and held that none of such rulings detract from the position that once a charge sheet is filed within the stipulated time, the question of grant of default bail does not arise. The filing of a charge sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) and whether cognizance is taken or not, is not material as far as Section 167 Cr.P.C. is concerned.

23 In the case of Central Bureau of Investigation Vs. R.S.Pai and another reported in AIR 2002 SUPREME COURT 1644, it was observed that "it cannot be held that the additional documents cannot be produced subsequently. If some mistake is committed in not producing the relevant documents at the time of submitting the report or charge-sheet, it is always open to the Investigating Officer to produce the same with the permission of the Court." It was further observed that "the word 'shall' used in sub-section (5) cannot be interpreted as mandatory, but as directory. Normally, the documents gathered during the investigation upon which Sajakali Jamadar 24 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc the prosecution wants to rely are required to be forwarded to the Magistrate, but if there is some omission, it would not mean that the remaining documents cannot be produced subsequently. Further, the scheme of sub-section (8) of Section 173 also makes it absolutely clear that even after the charge- sheet is submitted, further investigation, if called for, is not precluded. If further investigation is not precluded then there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or subsequent to investigation. In such cases, there cannot be any prejudice to the accused."

24 A Full Bench of the Punjab and Haryana Court in the case of State of Haryana Vs. Mehal Singh and another reported in 1978 CRI.L.J.1810 has held that when a charge-sheet is submitted without the reports of experts well within the period of 60/90 days from the date of arrest, merely because the report of the expert was not filed along with it, the accused is not entitled to be released on bail under Section 167(2) of Cr.P.C. In the said case it was observed that :

" The investigation of an offence cannot be considered to be inconclusive merely for the reason that the investigating officer, when he submitted his report in terms of sub-sec. (2) of S.173 to the Magistrate, still Sajakali Jamadar 25 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc awaited the reports of the experts or by some chance, either inadvertently or by design, he failed to append to the police report such documents or the statements under S.161 of the Code, although these were available with him when he submitted the police report to the Magistrate. Therefore, when a charge- sheet is submitted without the reports of experts well within the period of 60 days from the date of arrest, the accused is not entitled to be released on bail under Section 167(2).

... Since a report to qualify itself to be a 'police report' is required to contain only such facts as are mentioned in sub-section (2) of S.173, so if once it is found those that the police report contained all facts, then so far as the investigation is concerned the same has to be considered to have been completed. It is not incumbent on the investigating officer to reduce in writing the statements of the witnesses; he may merely include their names in the list of witnesses in support of the prosecution case when submitting the charge-sheet. Surely, if the charge- sheet thus submitted would be complete as enabling the Magistrate to take cognizance of the offence, there is no rational basis for holding that similar charge-sheet would not be a police report of the requisite kind if the statements of the witnesses although had been recorded under S.161 (3), but either by design or by inadvertence are not appended with the report and that the investigation of the case for that reason alone would be considered to be

incomplete thus entitling the accused to claim release on bail in view of the proviso to sub-sec. (2) of Section 167 of the Code if his detention had exceeded investigation sixty days. So far the investigation part of the job of the investigating officer is concerned, it is complete the moment he had collected all evidence and facts that are detailed in sub-sec.(2) of S.173 and from the evidence thus collected he is satisfied that the case deserves to be initiated against the accused. And further even if the investigating officer had not received the report of Sajakali Jamadar 26 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc the expert, so far as his job of collecting of the evidence is concerned, that is over the moment he despatches the material for the opinion of the expert and incidentally cites him as a witness if he relies on his testimony."

25 In the case of Kisan Lal Vs. State¹², decided by The Delhi High Court, the question raised by accused was that investigation into the offences under the N.D.P.S. Act cannot be held to be complete without obtaining the opinion of the expert and therefore the cognizance of offences under Section 190(1)

(b) of Cr.P.C. is not permissible. The admitted fact is that opinion of the C.F.S.L. by then had not been received by the investigating officer. The reports were subsequently received and filed before the concerned Courts. Those reports show that, samples from seized commodity were falling within the ambit of the N.D.P.S. Act. One of the accused preferred bail application under Section 167(2) of Cr.P.C. The accused Kisan Lal filed habeas corpus petition on the plea that his detention in judicial custody after 90 days of arrest was without the authority of law. The learned single Judge referred the matter to Division Bench. The Court had observed that, it is unnecessary to notice other judgments since the Supreme Court decision in Tara Singh;s case (Supra), holds that, a police report which is not accompanied by the experts opinion is to be held to be complete 12 39 (1989) DLT 392 Sajakali Jamadar 27 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc report as long as the witnesses who are acquainted with the circumstances of the case have been examined, continues to be a law inspite of amendments in Section 173 of the Code. The arguments that for offences under N.D.P.S. Act, the report under Section 173(2) of the Code, which in law is complete, is to be considered incomplete in the absence of the opinion of the expert, 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. As far as the experts report is concerned, by virtue of Sub-section (4) of Section 293 of the code, any document purporting to be a report under the hand of Director or a Deputy Director of a C.F.S.L. or S.F.S.L. can be used as evidence in any enquiry, trial or other proceedings under the Code. It is open to the Court where it thinks fit to summon and examine the scientific expert. Under Section 173 of the code, there is no mandate that Sajakali Jamadar 28 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc a police reports must enclose the document purporting to be a report under the hand of a Government scientific expert. The cognizance of the offences taken by the Magistrate was proper

and valid. Accused is not entitled for bail under Section 167(2) of Cr.P.C.

26 In the case of Mehabub Rehman @ Empha Vs. State (Special Cell, Delhi Police), the Delhi High Court considered similar issue. The Court relied on decision in the case of Kisan Lal (Supra) and held that, though F.S.L. 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 F.S.L. report over voice sample is not in the hands of investigating officer.

27 In State of Maharashtra v. Sharadchandra Dongre (supra), the Hon'ble Supreme Court, after advertng to the requirements of Section 173(2), at para 7 held as follows:

" The purpose of the submission of the police report with the details as mentioned above is to enable the Magistrate to satisfy himself, whether on the basis of the report and the material filed along with the police report, a case for taking cognizance has been made out or not. After applying his mind to the police Sajakali Jamadar 29 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc report and the material submitted therewith, if the Magistrate is satisfied that cognizance of the offence is required to be taken, he shall proceed further in accordance with the provisions of the Code of Criminal Procedure. Section 190(1)(b) Cr.PC provides that a Magistrate has the power to take cognizance upon a police report of such facts as are provided therein on being satisfied that the case is a fit one for taking cognizance of the offense. Therefore, if the police report and the material filed therewith is sufficient to satisfy the Magistrate that he should take cognizance, his power is not fettered by the label which the investigating agency chooses to give to the report submitted by it under Section 173(2) Cr.PC. Merely, because the prosecution had filed an application, after submission of the charge-sheet, seeking permission to file "supplementary charge- sheet", it could not affect the jurisdiction of the Magistrate to take cognizance, if he was otherwise satisfied from the material placed before him along with the charge-sheet that cognizance of the offense was required to be taken. It is the jurisdiction of the Magistrate and Magistrate alone to decide whether the material placed by the prosecution with the report (charge-sheet) was sufficient to take cognizance or not. The power of the Magistrate to take cognizance cannot be controlled by the investigating agency, whose duty is only to investigate and place the facts and the evidence before the Magistrate".

Sajakali Jamadar 30 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

28 In the case of Aleksander Kurganov (supra) this Court vide decision dated 5th February, 2021 dealt with questions viz. Does a charge-sheet without FSL report in the crime under the NDPS Act remain incomplete and attracting Section 36-A(4) of the Act and findings of the 'field test' suffer evidently because the test is by the Police and not an independent agency. Several decisions were placed for consideration before the Court including the decision in the case of Sunil Phulbande and Rafael Palafox Garcia (supra). The Court considered the decision of the full bench of Punjab and Haryana High Court in the case of State of Haryana Vs. Mehal Singh and another (Supra). Reference

was also made to the decision in the case of Dinesh Dalmia Vs. C.B.I. (Supra). This Court observed that the ratio of Dinesh Dalmiya (Supra) has to be considered as it holds that mere absence of forensic report does not vitiate the charge-sheet nor it should be treated as incomplete one.

29 In the case of Manas Krishna T. K. (supra) dealt with the decision in the case of Sagar Joshi (supra) and Aleksander Kurganov (Supra). On account of conflicting view, the learned Single Judge of this Court felt that the matter could be more advantageously heard by Division Bench so that the Sajakali Jamadar 31 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc contentious issue recurringly raised about the scope of filing charge-sheet without CA report and grant of default bail based thereon is sorted out one way or other. Para No.23 of the said order dated 7th July, 2021 reads as follows :-

" 23. Hence, in my considered opinion, given the conflicting decisions on the subject, the following questions arise and can be more advantageously considered by a Division Bench of this Court :

(i) Whether the presentation of a report under Section 173(2) Cr.PC. by the police without the report of Chemical Analyser/FSL amounts to incomplete challan and in the absence of any extension of time under Section 36-A(4) of the NDPS Act, whether the accused is entitled to bail under Section 167(2) Cr.P.C.?

(ii) Whether, in a charge sheet under NDPS Act, accompanied by a field testing report which is a part of the record, can be labeled as an incomplete report, simply because it is not accompanied by a report of Chemical Analyser/ FSL?

(iii) What is the legal efficacy of "Drug Law Enforcement, Field Officers' Handbook" issued by the Narcotics Control Bureau, Ministry of Home Affairs, Government of India."

Sajakali Jamadar 32 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

30 The reference made by the learned single Judge by this Court in the aforesaid decision has been answered by order dated 17th September, 2021 vide Criminal Misc. Application (Bail) No.88 of 2021. The said order indicate that the main issue for determination in this reference is whether in a case under the NDPS Act, the investigation can be said to be complete within the period prescribed under Section 167(2) of Cr.P.C. when a police report under Section 173(2) is filed before the Special Court without any CA/FSL report along. If, based upon such report the police report, an investigation is held as incomplete, then, accused will be entitled for the default bail. However, if the investigation is held as complete, no question of default bail would arise.

31 While adjudicating the aforesaid reference the counsel for accused had relied upon the decisions such as (i) Sunil Vasantrao Phulbande v. State of Maharashtra, 2002 (3) Maharashtra Law Journal 689, (ii) Punjaram v. State of Maharashtra 2005 Criminal Law Journal 4658, (iii) Ranjeet Manohar Machrekar v. The State of Maharashtra, Criminal Bail Application No.509/2014 (Bombay), (iv)

Manik Sahebrao Chaugule v. State of Maharashtra, Criminal Bail Application No.241/2017 (Bombay), (v) Seema Raju Panchariya v. The Sajakali Jamadar 33 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc State of Maharashtra, Criminal Bail Application No.65/2018 (Aurangabad), (vi) Sagar Parshuram Joshi v. The State of Maharashtra, Bail Application (ST) No. 4761/2020 (Bombay). 32 Whereas the prosecution had relied upon the decision such as (i) Balaji Vasantrao Suwarnkar v. State of Maharashtra, (1992) Maharashtra Law Journal 159, (ii) State of Maharashtra v. Sharadchandra Vinayak Dongre, (1995) 1 SCC 42, (iii) Babu s/o Rakhmanji Khamkar & Anr. v. The State of Maharashtra, (1995) 4 Bombay Cases Reporter 335, (iv) Rohini Mahavir Godse v. State of Maharashtra 1996 (2) Maharashtra Law Journal 492, (v) Rafael Palafox Garcia v. Union of India & Anr. 2008 All M.R. (Cri) 3031, (vi) Sheikh Shabbir s/o Mohd Shafi v. State of Maharashtra, Criminal Application no.143/2011 (Nagpur Bench), (vii) Srihari Mahadu Valse v. The State of Maharashtra, Criminal Bail Application No.3284/2018.

33 The submissions of advocate representing accused before the reference Court can be summarised as under:

(i) The decisions relied upon by advocate for accused reflected the correct position of law;

(ii) The right to default bail in terms of Section 167(2) Sajakali Jamadar 34 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc is indefeasible. This right flows from Article 21 of the Constitution of India;

(iii) Section 167 of Cr.P.C. does not refer to the filing of a police report under Section 173, but, only provides that an accused will be entitled to a default bail when an investigation is not completed within period prescribed under Section 167(2) of Cr.P.C.;

(iv) Cases under N.D.P.S. Act have to be treated differently from cases under I.P.C. or other enactments where C.A./F.S.L. report may not always form the fulcrum of the prosecution case;

(v) Unless there is evidence that, the substance recovered from the accused is a Narcotic Drug or a Psychotropic Substance, no prosecution could even lie under N.D.P.S. Act;

(vi) Investigation can never be said to be completed in the absence of any C.A./F.S.L. report. On such incomplete charge-sheet, the right of accused for default bail cannot be frustrated or denied;

Sajakali Jamadar 35 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

(vii) Under Section 173(2)(d), the police report is required to state whether any offence appears to have been committed and if so, by whom;

(viii) In N.D.P.S. case, police officer cannot form an opinion whether an offence appears to have been committed and if so by whom in the absence of the foundational fact i.e. whether the material is narcotic drug or psychotropic substance;

(xi) Field testing report is most unreliable and in absence of C.A./F.S.L. report, the investigation cannot be said to have been completed;

(x) Section 293 of Cr.P.C. accords special status to C.A./ F.S.L. report in N.D.P.S. matters. Mere filing of report under Section 173(2) is not determinative of completion of investigation;

(xi) Reliance is placed on decision in the case of Satya Narayan Musadi and Others Vs. State of Hyderabad¹³, Ranjeet Manohar Machrekar Vs. State of Maharashtra (Supra);

13 (1993) SCC Online AP 260 Sajakali Jamadar 36 of 59
02-BA-301-2020-with-3505-2019with-3506-2019.doc

(xii) Drug Law Enforcement Field Offers Handbook issued by Narcotic Control Bureau has statutory force. It has been issued by an expert agency in terms of Section 4(2) of the N.D.P.S. Act. It is binding on investigating agency under Article 256 of the Constitution of India. Reliance is placed on decision in the case of Swaraj Abhiyan Vs. Union of India¹⁴; Katya Cooperative Building Society Ltd. Vs. Government of Andhra Pradesh¹⁵, and, Dr.D.Y. Patil Educational Academy and Anr. Vs. Director of Technical Education and Ors.¹⁶;

(xiii) Even if documents and statements as contemplated by 173(5) may not be integral part of the police report under Section 173(2), still the production of such documents and statements is mandatory because of use of expression "shall", in Section 173(5), and, therefore, the requirement prescribed by Section 173(5) is mandatory, and, not merely directory;

14 (2018) 12 SCC 170

15 198(2) (H.C.) A.P. Law Journal 158

16 (2009) 1 Mah. L.J.192

02-BA-301-2020-with-3505-2019with-3506-2019.doc

(xiv) The decision in the case of Narendra Kumar Amin Vs. C.B.I.¹⁷, holding that provisions of Section 173(5) are directory is per incuriam since it conflicts with the ratio in the case of K. Veeraswami; ³⁴ The submissions by prosecution side were as follows:

(a) Police report under Section 173(2) of Cr.P.C. is only an opinion of the investigating officer that in so far as he is concerned, the investigation is complete in all respects;

(b) Requirement of forwarding documents and statements in terms of Section 173(5) is only directory and therefore even if no C.A./F.S.L. report is forwarded to the Special Court along with the police report, neither the police report nor the investigation be said to be incomplete;

(c) The limitations prescribed under Section 167(2) of Cr.P.C. 36 A(4) of the N.D.P.S. Act, is only for filing the charge-sheet, and, not for taking cognizance of the offence;

17 2015 3 SCC 417 Sajakali Jamadar 38 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

(d) Once a charge-sheet complying with the provisions of Section 173(2) of Cr.P.C. is filed within the period prescribed, no question of any default bail arises;

(e) Decision in the case of Phulbande (Supra) and the decision that follows it are per incuriam and even contrary to the law laid down by the Supreme Court;

(f) Prosecution relied on decision in Narendra Kumar Amin Vs. CBI¹⁸; Jagdish Purohit Vs. State of Maharashtra¹⁹; Suresh Kumar Bhikam Jain Vs. State of Maharashtra²⁰; C.B.I. Vs. R.S. Pai²¹; Narayan Rao Vs. State of A.P.²²; Tara Singh Vs. State (Supra); and Dinesh Dalmia Vs. C.B.I. (Supra)³⁵ The conclusions of division Bench while answering the reference are as follows:

(i) On the analysis of the statutory provisions, as also the decision that have analyzed various shades of such statutory provisions, Court believe that a police report or charge-sheet containing the details specified in Section 18 2015(3) SCC 417 19 (1998) 7 SCC 270 20 2013(3) SCC 77 21 2002 (5) SCC 82 22 AIR 1957 SC 737 Sajakali Jamadar 39 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc 173(2), if filed within the period prescribed under Section 167 (2) is not vitiated or incomplete simply because the same was not accompanied by CA/FSL report and based thereon, there is no question fo the accused insisting on default bail;

(ii) Certain binding precedents, directly on the point were not brought to the notice of the learned single judge who decided Phulbande (Supra). Rather, overruled and reversed decisions were cited before the learned single judge in the said matter. Hence, the decision in Phulbande (Supra) is per incuriam and does not reflect the correct position in law on the subject;

(iii) Phulbande (supra) takes the position that the charge-

sheet, though filed within the time limit specified under Section 167(2), if unaccompanied by a CA/FSL report, is incomplete and the accused is entitled to default bail. Phulbande (supra) was relied upon and/or followed in Punjaram (supra), Sagar Joshi (supra), Manik Chaugule (supra),

Seema Panchariya (supra), and Ranjit Machrekar (supra). Therefore, if Phulbande (supra) is found to be per incuriam, the decisions which follow it, Sajakali Jamadar 40 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc will not reflect the correct position in law on this subject.

(iv) In Phulbande (Supra), the Court has relied upon the decision of Andhra Pradesh High Court in Matchumari Chima Veskata Reddy Vs. State of Andhra Pradesh (Supra) and decision of this Court in Sharadchandra Vinayak Dongre Vs. State of Maharashtra 23. The decision in Matchumari (Supra) case is overruled by Division Bench of the same Court in Vellined Puram (Supra), wherein it was observed that the Bench cannot agree with view. It was held that police report filed under Section 173(2) is not complete unless the same is incomplete form complying with all formalities under Section 173(2) and (5) and the accused shall have absolute right for being released on bail, cannot be accepted. The decision in the case of Sharadchandra Dongre (Supra) has been reversed by the Hon'ble Supreme Court in the case of State of Maharashtra Vs. Sharadchandra Dongre²⁴, by observing that the view of the High Court is erroneous;

23 1991 (1) Mah.L.J. 656

24 1995() SCC 42

Sajakali Jamadar

41 of 59

02-BA-301-2020-with-3505-2019with-3506-2019.doc

(v) Decision in Phulbande (Supra) is per incuriam and does not reflect correct position of law. Phulbande was relied upon in Punjaram (Supra), Sagar Joshi (Supra), Manik Chwguale (Supra), Seema Pancheriya and Ranjit Machrekar (Supra). Therefore, if Phulbande is per incuriam, the decision which follow it, will not reflect correction position of law. The decision in the case of Balaji Suvarnakar (Supra) was not brought to the notice of Court. Decision of Suvarnakar was approved by Division Bench in the case of Rohini Godse (Supra), since Phulbande (Supra) was relied upon by Pajaram (Supra), Sagar Joshi (Supra), Manik Chowgule (Supra), Ranjit Machreker (Supra) and Seema Panchariya, these decisions will have to be held as per incuriam.

(vi) Expression such report used in Section 173(5) of Cr.P.C.

refers to the police report in terms of Section 173(2) of Cr.P.C. Section 173(5) of Cr.P.C. provides that in respect of a case to which Section 170 applies, the police officer shall forward to the Magistrate along with the report, the documents referred to in sub-clauses (a) and (b). This means that the report under Section 173(2) of Cr.P.C is different and distinct from the documents and Sajakali Jamadar 42 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc statements contemplated by Section 173 (5) Cr.P.C. though, there is a directory requirement that such documents and statements are required to be forwarded to the Magistrate along with the police report under Section

173(2) of Cr.P.C.

(vii) The police report containing all the details prescribed in section 173(2) is complete in terms of the statutory scheme. Therefore, merely because the documents or statements as contemplated by Section 173(5) may not have been forwarded by the police along with the complete police report under Section 173(2), such police report, will not be an incomplete police report and would not entitle the accused a default bail under section 167(2);

(viii) The decision in the case of Satyanarayn Musadi (Supra) make it clear that as long as the police report contains the details prescribed under Section 173(2), such report is a complete report in terms of Section 2(r). This conclusion was recorded on board based as well as narrow construction of statutory provisions. It was further held that once a charge-sheet in terms of Section Sajakali Jamadar 43 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc 172(2) is filed within the stipulated time, the question of grant of default bail, does not arise;

(ix) In the case of Suresh Kumar Bhikam Jain (supra), charge-sheet containing the details specified in Section 173(2) had been filed within the time prescribed under Section 167(2). However, no copy of the sanction order was produced along with such a charge sheet. The accused contended that in the absence of a sanction order, the Magistrate had no authority to take cognizance of the offense or to pass any further remand orders under Section 309 and therefore the accused was entitled to default bail under Section 167(2). This contention was however negated holding that a police report or a charge sheet containing details specified in Section 173(2) had been filed within the period stipulated under Section 167(2) and the issue of cognizance was to be addressed later. The police report was complete even though the sanction order was not accompanying it, and therefore, the accused was not entitled to default bail. In this case the Hon'ble Supreme Court considered its several earlier rulings and held that none of such rulings detract from the position that once a charge sheet is filed Sajakali Jamadar 44 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc within the stipulated time, the question of grant of default bail does not arise. The filing of a charge sheet is sufficient compliance with the provisions of Section 167(2)(a)(ii) and whether cognizance is taken or not, is not material as far as Section 167 Cr.P.C. is concerned;

(x) In Tara Singh (supra), the police filed their challan (police report or charge sheet) on 03.10.1949 which was the last date as stipulated under Section 167(2). The report of the imperial serologist and drawing of the sketch map of the occurrence was however produced by filing a second challan on 05.10.1949 i.e. beyond the period stipulated in Section 167(2). Based on this, the accused contended that he was entitled to default bail because the challan filed on 03.10.1949 was an incomplete challan or that the first challan filed on 03.10.1949 stood vitiated on account of the filing of the second challan on 05.10.1949. The Hon'ble Supreme court speaking through Vivian Bose J. rejected the aforesaid contention of the accused. The Court held that the challan filed on 03.10.1949 was a complete challan, even though the report of the imperial serologist or the drawing of the sketch map of the occurrence did not Sajakali Jamadar 45 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc accompany the same. The Court held that all that Section 173(1)(a) requires is that as soon as the police investigation under Chapter XIV is

complete there should be a report forwarded to the Magistrate in the prescribed form setting forth names of parties, nature of information, and names of persons who appear to be acquainted with circumstances of the case. Since all this appears to have been done in the report of 02.10.1949, the Court ruled that it was in fact a complete report as contemplated under Section 173(1) of the Code even though the police had themselves referred to it as an incomplete report.

(xi) The Full Bench of Punjab and Haryana High Court in *State of Haryana v. Mehal Singh and Anr.* - AIR 1978 P&H 341, on a detailed consideration of statutory provisions and precedents on the subject, has held as follows:

"..... Since a report to qualify itself to be a 'police report' is required to contain only such facts as are mentioned in 173 (2), so if once it is found that the police report contained all those facts, then so far as the 'investigation' is concerned the same Sajakali Jamadar 46 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc has to be considered to have been completed".Even if the investigating officer had not received the report of the expert, so far as his job of collecting of evidence is concerned, that is over the moment he despatches the material for the opinion of the expert and incidentally cites him as a witness if he relies on his testimony."

(xii) In *Narendra Kumar Amin (supra)*, the Supreme Court enumerated the information that must be detailed in the police report forwarded to the Magistrate by investigating officer as provided under Section 173(2). Even Section 190(1)(b) of Cr.P.C. refers only to a police report under Section 173(2) for taking cognizance. The Court referred to three judge bench judgment in *C.B.I. Vs. R.S. Pai (Supra)*, wherein it is held that omission in not producing relevant documents at the time of submitting the police report can always be made good by the police officer after seeking leave to produce the same. If further investigation is not precluded under Section 173(8), then, there is no question of not permitting the prosecution to produce additional documents which were gathered prior to or Sajakali Jamadar 47 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc subsequent to the investigation and the word shall used in Section 173(5) cannot be regarded as mandatory, but, is only directory. The Court analysed statutory scheme and concluded that as long as a police report containing the details in Section 173(2) was filed within the period stipulated in Section 167(2), there was no question of an accused claiming a default bail. This decision is a authority for the proposition that there is a distinction between a police report under Section 173(2) and documents and statements under Section 173(5) to ordinarily accompany such a police report and that the provisions of Section 173(5) about forwarding of documents and statements alongwith police report, is only directory and not mandatory. As long as a police report containing the details prescribed in Section 173(2) is filed within period stipulated in Section 167(2) such police report cannot be regarded as incomplete or deficit merely because all the documents or statements in terms of Section 173(5) were not filed alongwith such a police report. No question of default bail would arise in such a case.

Sajakali Jamadar 48 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

(xiii) The decisions in Narendra Kumar Amin, CBI Vs. R.S. Rai and Narayan Rao (Supra) in terms hold that, the provisions of Section 173(5) are only directory notwithstanding the use of the expression "Shall" therein. This means that even if there is omission or failure on the part of police officer to forward the documents and statements as contemplated by Section 173(5) along with the police report under Section 173(5) along with the police report under Section 173(2) there is no scope to hold that the police report under Section 173(2) is either incomplete or that, the same was filed without the completion of investigations by the police officer.

(xiv) The submission of counsel for accused that decision of Supreme Court in the case of Narendra Kumar Amin (Supra) holding that the provisions of Section 173(5) are directory is per incuriam on the ground that it conflicts court ratio in constitution bench decision in K. Veeraswami (Supra) and that decisions of R.S. Pai (Supra), and Narayan Rao (Supra) were decided under old Cr.P.C. deserves to be rejected. The contention that Narendra Kumar Amin (Supra) conflicts with the ratio of constitution bench ruling in paragraph 76 of Sajakali Jamadar 49 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc K.Veeraswami (Supra) was squarely raised in Narendra Kumar Amin itself, but, the same was turned down. In paragraph 15 of Narendra Kumar Amin (Supra), it was observed that the observations made at paragraph 76 of the constitution bench judgment in the case of K.Veeraswamy (Supra) that the report is incomplete if it is accompanied by all documents and statements of witnesses as required under Section 173(5) of Cr.P.C. cannot be construed as statement of law, since it was not made in the context of the police report under Section 2(r) read with Section 173(2)(5) and (8) of Cr.P.C. On the contrary, the three judge bench in the decision in C.B.I. Vs. R.S. Pai (Supra) after referring to the earlier judgment of the coordinate bench in Narayan Rao's case (Supra), categorically held that, the word 'shall', used in Sub-section (5) cannot be interpreted mandatory, but, directory. Therefore, filing of the report containing particulars mentioned under Section 173(2) amounted to completion of filing of report. The reference bench than observed that, Narendra Kumar Amin (Supra) makes specific reference to K. Veeraswamy (Supra) will be binding on this Court and decision of Narendra Kumarj Amin (Supra) cannot be held to be per incuriam.

Sajakali Jamadar 50 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc

(xv) Incidentally, in Aleksander Kurganov v. State of Goa & Anr. - Criminal Misc. Application (Bail) No.37 & 38 of 2021 (F) (Bombay) dated 05.02.2021, the learned Single Judge of our Court, in the context of NDPS Cases noted the conflicting set of decisions on the issue of whether a charge sheet can be said to be incomplete merely because the CA/FSL report was not filed along with it within the period stipulated under Section 167(2) Cr.P.C. After noting this conflict the learned Single Judge further noted that as a Single Judge, faced with a decisional conflict, the principles of precedent do not allow him to choose one over the other and that this issue must be resolved by a bench of superior numeric strength. However, the learned Single Judge, at para 66 held that the necessity of a reference to a Division Bench is obviated on account of the ratio in Dinesh Dalmiya (supra). The learned Single Judge has observed that Dinesh Dalmiya (supra) is an authority for the proposition that a mere absence of a forensic report neither renders the charge sheet as incomplete nor vitiates such a charge sheet. The Court endorsed this reasoning of the learned Single Judge.

Sajakali Jamadar 51 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc (xvi) The counsel for accused were unable to demonstrate that there was some significant change in the provisions of the old Code and the new Code insofar as the status of a police report or charge-sheet was concerned. On the analysis of statutory provisions as also the decision that have analysed various shades of such statutory provisions, a police report or a charge - sheet containing the details specified in Section 173(2), if filed within the period prescribed under Section 167(2) is not vitiated or incomplete simply because the same was not accompanied by a C.A./F.S.L. report and based thereon, there is no question of the accused insisting on default bail. (xvii) The contention of learned counsel for the accused that the cases under N.D.P.S. Act deserve special treatment when it comes to interpreting the provisions of Section 167, 173, 190 and 309 of Cr.P.C. on account of the identity of the substance is foundational fact to launch a prosecution and in the absence of C.A./F.S.L. report in N.D.P.S. cases, the Magistrate or special court will not be in a position to take cognizance of the offences, cannot be accepted. In the absence of any support from provisions of Cr.P.C., it is not possible to accept the submission. The Sajakali Jamadar 52 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc charge-sheet is the expression of opinion on the part of investigating officer that so far he is concerned the investigation is complete. Thereafter, it is for the Magistrate or the special court to decide whether a case has been made out to take cognizance of the offence or not. In the precise context of cases under the N.D.P.S. Act, there is a long line of decisions delivered by the learned Single Judge of this Court in Suwarnkar (Supra), Rafel Garcia (Supra), Aleksander Kurgaonkar (Supra), Shrihari Valse (Supra) and Sheikh Shabir (Supra), that had taken a view that a charge-sheet unaccompanied by C.A./F.S.L. report is not complete and, therefore, where the same is filed within prescribed period, the accused cannot insist on default bail. This decision reflects the legal position correctly, and, therefore, the Court endorses them.

(xviii) The contention that a Magistrate or the Special Court, in any N.D.P.S. case, is not competent to take cognizance of any offence based on a field-testing report, as reflected in the panchanama or otherwise in the absence of C.A./F.S.L. report is too wide a proposition to commend acceptance. The Magistrate or Special Court will have to Sajakali Jamadar 53 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc assess the charge-sheet and if necessary, the documents and the statements produced under Section 173(5) and thereafter decide whether any case is made out for taking cognizance of the offence.

(xix) In Jagdish Purohit Vs. State of Maharashtra (Supra), the Supreme Court after rejecting the C.A./F.S.L. report sustained the conviction by accepting the evidence of the members of the raiding party to prove that the powder which was found in the factory was methaqualone. The evidence was found sufficient to sustain a conviction even after ignoring C.A./F.S.L. report. If a conviction could be sustained on such evidence, cognizance of offence can be taken based on such material produced along with the charge-sheet. This has to be assessed on a case-to-case basis.

(xx) Presentation of a police report under Section 173(2) unaccompanied by a C.A./F.S.L. report does not amount to any incomplete charge-sheet/ challan even in the absence of an extension of time under Section 36 A(4) of the N.D.P.S. Act. The accused cannot insist upon a default bail.

Sajakali Jamadar 54 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc (xxi) Police report under Section 173(2) or a charge-sheet/challan accompanied by field testing reports, as reflected in the panchanama or otherwise also cannot be labelled as an incomplete police report/charge-sheet/challan simply because the same was not accompanied by a C.A./F.S.L. report.

(xxii) The "Drug Law Enforcement Field Officers Handbook", issued by N.C.B. has no legal efficacy in the sense that it has no statutory flavour or the handbook is not a set of executive instructions issued by the Central Government. (xxiii) The reference was answered as follows:

(a) Question no. (i) is answered by holding that even 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 under Section 167(2) Cr.P.C. r/w. Section 36-A(4) of the NDPS Act, the accused cannot insist upon a default bail.

(b) Question no. (ii) is answered by holding that in an

Sajakali Jamadar

55 of 59

02-BA-301-2020-with-3505-2019with-3506-2019.doc NDPS case, a charge sheet accompanied by a field testing report as reflected in the Panchanama or otherwise also cannot be labelled as an incomplete police report/charge-

sheet/ challan simply because the same was not accompanied by a CA/FSL report.

(c) Question no. (iii) is answered by holding that the Drug Law Enforcement Field Officers' Handbook issued by the NCB has no legal efficacy, in the sense that the handbook has no statutory flavour or the handbook is not a set of executive instructions issued by the Central Government.

36 In the light of the decision of Division Bench in the case of Manas Krishna T.K. and various decisions referred to hereinabove, these applications seeking bail in accordance with Section 167(2) of Cr.P.C. read with Section 36A(4) of N.D.P.S. Act are devoid of merits. Charge-sheet was filed within 180 days. The material on record in the nature of panchanama, statement of witnesses, nature of commodity seized satisfied the investigating agency that what was recovered is Ganja. In the absence of field test which was not conducted and C.A. report accompanying charge-sheet, it cannot be said that Sajakali Jamadar 56 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc charge-sheet was incomplete. C.A. report which opines that the contraband is Ganja, is on record. Requisition calling upon analysis of samples were made to C.F.S.L. before completion of 180 days. Absence of C.A./F.S.L. report with charge-sheet would not result in declaring the charge-sheet as incomplete. The Division Bench has answered the reference as above. The decision is binding on this Court. In several other decisions the contention about right of default bail claiming that charge-

sheet is incomplete in the absence of CA/FSL has been rejected. I am in agreement with the said view. The Division Bench while answering the reference has endorsed the said view. The decisions of this Court in which the said provisions is accepted is held to be per per incuriam.

37 The investigating officer has forwarded letter to C.A./F.S.L. with samples for analysis on 2nd August, 2019. The CA report is now part of proceedings. The report is ordinarily filed in the form prescribed. One of the requirement for submission of Police Report is whether any offence appears to have been committed. In the decisions referred to above it is held that, even through experts report did not accompany charge-sheet, it cannot be said that it is incomplete charge-sheet. Once a charge-sheet is filed within stipulated time, the Sajakali Jamadar 57 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc question of default bail does not arise. It cannot be held that additional documents cannot be produced subsequently. There is no specific provision due to which no additional documents can be produced. When the charge-sheet is submitted without reports of experts well within the period of 60/90/180 days, merely because the report of expert was not filed along with it, the accused is not entitled to be released on bail under Section 167(2) of Cr.P.C. In the present case C.A./F.S.L. report shows that what was seized from accused is Ganja. The submission that in NDPS case the report under Section 173(2) of the code is incomplete in the absence of expert report cannot be accepted. By virtue of section 293 of the Code any document in the form of report of C.F.S.L. can be used as evidence in any enquiry, trial or other proceedings, under the Code. It is open to the Court to summon and examine scientific expert. The satisfaction of investigating officer/members of raiding party during seizure of contraband that what is recovered is Narcotic drug/Psychotropic substance or controlled substance cannot be doubted at this stage. The purpose of submission of the police report with the details is to enable the Court to satisfy whether on the basis of report and the material filed along with report, case for taking cognizance has been made out or not. In the light of observations in several decisions referred hereinabove, Sajakali Jamadar 58 of 59 02-BA-301-2020-with-3505-2019with-3506-2019.doc the police report or charge-sheet containing the details specified under Section 173(2) of the Code is filed within prescribed period, default bail cannot be granted. The word 'shall' used in Section 173(5) cannot be recorded as mandatory but it is directory. As long as police report containing the details in Section 173(2) was filed within stipulated period under Section 173(2), there was no question of an accused claiming default bail. In absence of provisions of law no distinction can be made in NDPS case. In the present case there was no field test conducted. The officers who seized the contraband were of the opinion that on the basis of smell and nature that it was Ganja. Even otherwise in consonance with law laid down in various decisions, in the absence of CA report with charge-sheet, it cannot be termed as incomplete. Bail cannot be granted.

38 Hence, I pass the following order:

:: ORDER ::

Bail Application Nos. 301 of 2020, 3505 of 2019 and 3506 of 2019, are rejected, and, stand disposed of accordingly.

(PRAKASH D. NAIK, J.) Digitally signed by SAJAKALI SAJAKALI LIYAKAT Sajakali Jamadar 59 of 59 LIYAKAT JAMADAR Date:

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