P L D 2002 Supreme Court 590

Present: Iftikhar Muhammad Chaudhry, Hamid Ali Mirza and Sardar Muhammad Raza Khan, JJ

Hakim MUMTAZ AHMED and another---Petitioners

versus

THE STATE---Respondent

Criminal Petitions Nos. 236 and 669-L of 2001, decided on 17th April, 2002.

(On appeal from the judgment/order dated 16-7-2001 passed by Lahore High Court, Lahore, in Criminal Miscellaneous No.6066/B of 2000).

(a) Criminal Procedure Code (V of 1898)---

----Ss. 344, 167 & 173---Detention of accused in police custody if challan not filed in terms of S.173, Cr.P.C.---Effect---Police Officer as per S.344, Cr.P.C. is duty bound to furnish justification of detention of accused in custody if challan under S.173, Cr.P.C. has not been filed and trial has not commenced, otherwise in absence of report of a police officer or challan, detention of the accused would be unjustified and against the provisions of law.

(b) Criminal Procedure Code (V of 1898)---

----Ss. 173 & 167----Investigating Agency must strictly adhere to the provisions of S.173(1), Cr.P.C.---Notwithstanding the fact that before or after completion of investigation period prescribed under S.167, Cr.P.C., if it is not possible to submit final report, the Investigating Agency should strictly adhere to the provision of S.173(1), Cr.P.C. and must submit interim challan through Public Prosecutor for trial and the accused arrested in the case should not be kept in custody for indefinite period without any legal justification.

Mazhar Hussain v. Ishtiaq Hussain and another PLD 1990 Lah. 249; Aftab Ahmad v. Hasan Arshad and 10 others PLD 1987 SC 13; Mulazim Hussain v. S.H.O., Police Station Shorkot, District Jhang and 2 others 1995 PCr.LJ 440 and Muhammad Jamil v. S.H.O., Police Station Ahmadpur, District Sheikhupura 1997 MLD 2094 ref.

(c) **Criminal Procedure Code (V of 1898)---**

----S. 497---Prohibition (Enforcement of Hadd) Order (4 of 1979), Arts.3/4---Control of Narcotic Substances Act (XXV of 1997), S.9-- Constitution of Pakistan (1973), Art. 185(3)---Bail---Offences with which the accused was charged did not fall within the prohibitory clause of S.497(1), Cr.P.C.---Accused had remained in jail for about one year and the case had not proceeded so far and even the charge had not been framed---Record did not show that the accused was likely to abscond, tamper with prosecution evidence or repeat the offence after his release on bail---Accused was not a previous convict---Delay in receipt of Chemical Examiner's Report of the contraband by itself was not a bar to the grant of bail when reasonable grounds exited for believing that the accused was not connected with the commission of the offence---Non-mention by the counsel of accused while filing bail application before High Court about filing of another application for bail before the Trial Court, would not itself be a ground to penalize the accused for the fault committed by his counsel in case the accused had

been found entitled to grant of bail---Despite earlier information respectable persons of the locality were not associated in recovery proceedings carried out against the accused---Allegations against accused, thus, needed further inquiry---Petition for leave to appeal was converted into appeal and allowed in circumstances and interim bail already granted to accused was confirmed accordingly.

Mazhar Hussain v. Ishtiaq Hussain and another PLD 1990 Lah. 249; Aftab Ahmad v. Hasan Arshad and 10 others PLD 1987 SC 13 Mulazim Hussain v. S.H.O., Police Station Shorkot, District Jhang and 2 others 1995 PCr.LJ 440; Muhammad Jamil v. S.H.O., Police Station Ahmadpur, District Sheikhupura 1997 MLD 2094; Aamir v. The State PLD 1972 SC 227; Muhammad lqbal alias Bala v. The State 1989 PCr.LJ 1334; Mst. Fehmida v. The State 1997 SCMR 947; Liaqat Ali v. The State 1998 PCr.LJ 1444; Muzaffar Shah v. The State 1998 PCr.LJ 1540; Aslam alias Ashraf v. The State 1999 MLD 474; Rajwali v. The State 1998 PCr.LJ 664; 1981 PCr.LJ 393; PLD 1992 Quetta 67; PLD 1963 SC 1; PLD 1990 SC 1092; IM SCMR 485 and Imtiaz Ahmad v. The State PLD 1997 SC 545 ref.

(d) Criminal Procedure Code (V of 1898)---

----Ss. 497(1), 173(1) & 344---Bail---Non-submission of challan under S.173(1), Cr.P.C. or commencement of trial under S.344, Cr.P.C. per se would not constitute a ground for grant of bail to an accused under S.497(1), Cr.P.C. particularly in the matters where accused is involved in a heinous crime entailing punishment of imprisonment for life.

1981 PCr. LJ 393 and PLD 1992 Quetta 67 ref.

Habib-ul-Wahab-ul-Khairi, Senior Advocate Supreme Court and Mehr Khan Malik, Advocate-on-Record for Petitioner (in Cr.P. No.236 of 2001).

Najam-ul-Hassan Kazmi, Advocate Supreme Court for Petitioner (in Cr.P. No. 669-L of 2001).

M. Ashraf Khan Tanoli, Advocate-General, Balochistan and Zahid Hussain Bukhari, Advocate Supreme Court (on Court's Notice).

Ch. Dil Muhammad Tarrar, Advocate Supreme Court and Akhtar Hussain, District Attorney for the State.

Date of hearing: 1st February; 2002.

ORDER

IFTIKHAR MUHAMMAD CHAUDHRY, J.---Petitioner Hakim Mumtaz. Ahmad seeks leave to appeal against judgment, dated 16th July, 2001 passed by learned Division Bench of Lahore High Court, Lahore whereby bail granted to him by Additional Sessions Judge Mandi Bahaudddin (Muhammad Alamgir Khan) dated 11th November, 2000 has been withdrawn.

In the impugned judgment observations have also been made for initiating action against Mr. Muhammad Alamgir Khan the then Additional Sessions Judge, Mandi Bahauddin, therefore, he has also filed Cr.P.L.A. No.669-L of 2001 for annulment of the same. As such, we intend to dispose of both the matters by means of instant judgment. '

2. Precisely stating facts of the case are that vide F.I.R. No.358 of 2000 dated 9th September, 2000 a case was registered against Hakim Mumtaz . Ahmad on the complaint of Muhammad Anwar, S.-I., CIA Staff under Articles 3/4 of Prohibition

(Enforcement of Hadd) Order, 1979 and sections 9/8 of Control of Narcotic Substances Act, 1997. It is mentioned in the F.I.R. that on the day of incident when complainant (Muhammad Anwar, S.-I.) alongwith police party was present in front of Nagina Cinema, Mandi Bahauddin he sent decoy customer alongwith tainted currency notes to purchase opium from the Dawakhana of Hakim Mumtaz Ahmad. The customer went to his Dawakhana and came back with purchased opium. On this raid was conducted in his shop, during course whereof 142 grams of opium was recovered from the pocket of his shirt alongwith Rs.3,000. Out of the recovered opium 10 grams were taken out for the purpose of obtaining report of Chemical Analyser.

3. After registration of the case petitioner preferred an application for bail before arrest, which was declined, as such he was taken into custody. Later on he submitted an application for grant of post-arrest bail, which was rejected on' 26-9-2000. Relevant para. therefrom is reproduced hereinbelow:--

> " Though the accused/petitioner has claimed his innocence and alleged mala fide on the part of the police, but from tentative assessment of case file, it has not been established. The menace of narcotics is increasing day by day and it is creating bad effect on our society.
>
> 3. Keeping in view the aforementioned circumstances, I see no justification to release the accused/petitioner, especially at this initial juncture. Let the report of the chemical examiner be received and let the challan of this case be submitted, whereafter the question of grant of bail or otherwise may be looked into. With these observations, without going into the merits and demerits of the case; the bail petition stands dismissed."

It may be noted that in view of the observations so made by the Additional Sessions Judge, Mandi Bahauddin neither report of the Chemical Examiner was received nor challan was submitted by the prosecution in the Court, therefore, petitioner repeated application for bail which was allowed vide order dated 11-11-2000. Relevant para. therefrom is reproduced herein below:--

"2. Arguments heard and record perused. In this case, accused/petitioner Mumtaz Ahmad has earlier moved for post-arrest bail, but his petition has since been dismissed vide order dated 26-9-2000 wherein it was observed that report by the Chemical Examiner has not been received and question for grant of bail or otherwise may be looked into after the receipt of the report by the Chemical Examiner and after the receipt of challan, but the local police has not, so fir, bothered to collect the report. Incomplete challan has also not been put in Court despite the fact that accused/petitioner Mumtaz Ahmad was arrested on 9-9-2000. The prosecution is bound to submit complete challan within 14 days after judicial custody of the accused, but in this case, relevant provisions of law have also been violated. The police is not required to play with the liberty of common citizen at the own whims. Prima facie, the detention of Accused/petitioner after 14 days of remand, without submission of challan, has become illegal. Keeping in view these circumstances, I see no other alternate, but to release the accused/petitioner on bail."

4. It is important to note that order dated- 26-9-2000 passed by Additional Sessions Judge was challenged by the petitioner before Lahore High Court by invoking its jurisdiction under section 498, Cr.P.C. but pending decision of said bail application, another application was repeated before Additional Sessions Judge, who allowed the same vide order reproduced hereinabove. As such, a request was trade for permission to withdraw the application from learned High Court, which was declined on 21-11-2000. The learned Judges postponed the case for 22-11-2000 and directed the State Counsel to find out from the concerned jail as to whether petitioner was still in custody or he has been released on bail. On this it transpired that he has secured his release on bail, as such notice was issued to petitioner to show cause as to why the bail secured by

him from Additional Sessions Judge, Mandi Bahauddin during pendency of petition for bail before the High Court may not be recalled. Consequently on 9th October, 2001 vide impugned judgment learned Division Bench of High Court cancelled bail of the petitioner. '

5. At the time of hearing of petition it transpired that story put forward by the prosecution as mentioned in the F.I.R prima facie is not convincing, therefore, to ascertain correct position record of the case was summoned. On examination of record it transpired that challan of the case has not been submitted within 14 days as required under section 173, Cr.P.C. Besides it, neither the investigation of the case was properly supervised by the then S.P., Mardi Bahauddin nor District Attorney took interest in processing the challan according to law, therefore, notices were issued 1 of them to appear and explain their positions.

6. It is surprising to note t at petitioner was arrested on 9th September. 2000 by the police and initially he remained in custody up to 11th November, 2000 when he was released on bail because of non-submission o1 challan against him. We were informed that after registration of the case S.H.O. on receipt of report from Investigating Officer prepared challan on 15th September, 2000 which was endorsed by D.S.P. on 18th September, 2000 and as per note appended therwith it was sent to Prosecution Branch on 14th October, 2000 from where it was put before the District Attorney namely Akhtar Hussain on 8-11-2000 who statedly returned the same on the said date with certain objections. But those objections are not available either on the police file or on judicial record. We inquired from Mr. Akhtar Hussain, District Attorney present in the Court the nature of the objections on the basis of which he did not forward challan to the Court, he could not answer satisfactorily. Mr. Muhammad Nawaz, the then Sub-Inspector of Police/Investigating Officer is also present in the Court and he stated that to his belief and knowledge no objection was communicated to him. Somehow the case file remained pending with the police and again it was sent to District Attorney on 4th January, 2001 and ultimately final report/challan was submitted in Court on 17th January, 2001

7. The above statement of facts makes it clear that Investigating Agency/Police of Mandi Bahauddin had no justification to detain the petitioner in custody from the date of expiry of period of remand of 14 days till submission of challan i.e. 17th January, 2001. For this negligence the Judicial Magistrate who has been remanding the accused in judicial custody in terms of section 344, Cr.P.C. would be equally responsible because if he had insisted upon the Police/Investigating Agency to at least submit interim challan failing which accused would not be remanded to custody, the police had no option but to comply., with his order. Difficulty is that in such situation neither the police nor the District Attorney nor the Magistrate granting police as well as judicial remand are ready to take responsibility in not complying with the provisions of section 173, Cr.P.C. which prescribes procedure for submissions of challan even if investigation has not been completed. But all the concerned functionaries i.e. Investigating Agency/Police, District Prosecution Agency and Presiding Officer of the Court who had been granting remand of the accused either to the police or the judicial remand demonstrated inefficiency in performing their statutory obligations thus exposing themselves for departmental actions under relevant Efficiency and Discipline Rules, accordingly.

8. It is not only this case in which it has been noticed that the Investigating Agency as well as District Attorneys have failed to submit challan of the case registered against accused within the stipulated period but in majority of the case the police report/challan under section 173, Cr.P.C. is not filed despite expiry of stipulated period due to which accused persons involved in criminal case remain languishing in custody without trial and ultimately for such reason accused claim bail despite their detention in the offences which are heinous in nature because denial of bail to an accused in non-

bailable offence under the circumstances would be against the principle of administrative justice.

Admittedly, for such delay no one else except the police and the office of the District Attorney can be held responsible for not submitting the challan. Surprisingly, in the instant case, the representatives of both the agencies i.e. the then Superintendent of Police, Mandi Bahauddin and the District Attorney instead of accepting their fault found their rescue for not complying with the mandatory provisions of law under section 173, Cr.P.C. started blaming each other but ultimately failed to furnish satisfactory explanation for not complying the process of submission of challan within stipulated period of 14 days: Factually both the agencies are equally responsible for not complying with the provisions of law because as far as Superintendent of Police is concerned he is not only a figure head of the District Police but it is his one of the duty to adopt effective devices to ensure that criminal cases registered by the Police within his jurisdiction are processed strictly in accordance with law and if it is not possible to submit final challan then he should ensure submission of at least interim challan in terms of proviso to section 173(1), Cr.P.C. and if the S.H.Os. or Investigating Officers are found negligent in not complying with the mandatory provisions of law, he should initiate action against them promptly and if he himself is contributory in this behalf for any reason then action could also be initiated against him departmentally as well as by the Courts for causing delay in the trial of cases and detaining accused person in custody without trial contrary to the provision of Article 9 of the Constitution of Islamic Republic of Pakistan because this Article provides that no person shall be deprived of his life or liberty save in accordance with law. Therefore, if an accused is arrested in a cognizable offence by the police or law-enforcing agencies, it is his right to be dealt with save in accordance with law i.e. a justification has to be shown for his detention in custody because on the arrest of an accused initially he can be detained without permission of the Court for a period of 24 hours under section 61, Cr.P.C. and if during this period investigation of the case is not completed and the police has reasons to believe that the accusation or information is well-founded then he shall be produced before the Magistrate who after having satisfied himself about progress of the case may authorize detention of such person in police custody for a period not exceeding 15 days as a whole under section 167, Cr.P.C. On completion of maximum period of police remand the accused becomes entitled for trial and every Investigating Officer is duty bound to complete interrogation of the accused within stipulated period and no unnecessary delay is tolerable in this behalf because after completion of investigation, challan is .to be submitted before the Court of competent jurisdiction through the Public Prosecutor. As per section 344, Cr.P.C. it is the duty of the Police Officer to furnish justification for detention of accused in custody if challan under section 173, Cr.P.C. has not been filed and trial has not commenced, otherwise -in absence of report of a police officer of challan, detention of the accused would be unjustified and against the provisions of law.

9. Delay in submission of challan/police report under section 173, Cr.P.C. has been noticed invariably in the criminal cases, despite the fact that section 173 of the Code of Criminal Procedure has been amended by Act XXV of 1992 whereby a facility has been extended to the Investigating Agency for submitting interim report the period of 3 days from the completion of period of 14 days of the police remand but instead of deriving benefit from this provision of law, the Police Authorities including S.H.Os. and high-ups up to the rank of Senior Superintendent of Police never bothered to comply with this mandatory provision of law.

10. Undoubtedly section 173, Cr.P.C. was amended vide Act XXV of 1992 with a view to improve performance of the Police Department and simultaneously to stop the police from adopting protracted investigation process for one of the other pretext but the police authorities had in fact rendered the provisions of section 173, Cr.P.C. ineffective by not following its spirit. In this behalf it is to be noted that unconvincing delaying tactics are adopted by the concerned investigating officers as it has exactly

happened in the instant case because the then Superintendent of Police Mandi Bahauddin who is supposed to be incharge of criminal cases as per rule 5.1, Chapter 5 of the Punjab Law Department Manual, 1938 failed to furnish reasons for not submitting the challan before the Court through Public Prosecutor as per the provisions of section 173, CI.P.C. Similarly Public Prosecutor who is also the Incharge of District Prosecution Agency in terms of rule 5 A.2, Chapter 5-A of the Punjab Law Department Manual, 1934 could not satisfy the Court for not submitting the challan/police report final or interim within the stipulated time.

11. It may be noted that in the case of Mazhar Hussain v. Ishtiaq Hussain and another (PLD 1990 Lahore 249) it has been held that primarily it will be the function of the District Prosecution Agency to finally scrutinize the charge-.sheet or report under section 173, Cr.P.C. of a case and on receipt of report from the police submit the same before the Court concerned. On having seen the conduct of the Investigating Agency and District Prosecution Agency we are of the opinion that in absence of good working relations between both the agencies it is not possible to strictly adhere to the provisions of section 173, Cr.P.C. but on account of non-cooperation between both the agencies no one has suffered except the accused/petitioner who remained in detention without trial for a considerable period as it has been noted hereinabove. In this regard, the Court which had been granting judicial remand of the petitioner in terms of section 344, Cr.P.C. would also equally responsible for the delay in commencement of trial case because if it had insisted hard upon police to comply with the provisions of section 173, Cr.P.C. or to face consequence for keeping the accused in custody there was no reason that concerned S. H. O./Investigating Officer had not put up challan against the accused. It is a general practice that we do, point out weaknesses in the system but don't bother to discharge the duty cast upon the functionaries seized with the matter, We are sure that if the provisions of section .173, Cr.P.C. are complied with in letter and spirit the delay in submission of challan and completion of trial in criminal cases can conveniently be controlled.

12. We may observe here that on completion of period of police remand under section 167, Cr.P.C. if final or interim report has not been submitted the Magistrate before whom accused has been produced for remand can insist upon the prosecution by passing order in writing to comply with the provisions of section 173(1). Cr.P.C. or record reasons for remanding the accused to judicial custody for want of challan in terms of section 344, Cr.P.C. and simultaneously direct initiation of departmental proceedings against police officer responsible for submission of challan for not complying with mandatory provision of law and proving thereby himself/themselves to be inefficient police officers, the positive result shall start coming forward. Similarly in the instant case the Magistrate as well as Additional Sessions Judge; who had been granting police or judicial remand without insisting upon the S. H. O./Investigation Officer to submit challan had failed t discharge his/their duties. Surprisingly, the Additional Sessions Judge vide order dated 26-9-2000 declined bail to petitioner because challan against him was not put-up but when request for grant of bail was repeated he granted bail to the accused ' instead of initiating stern action against S.H.O./Investigation Officer as well as Superintendent of Police for not submitting the challan is also responsible for unjustified detention of the accused.

We believe that not only the police and judicial officers who were associated with the instant case have violated the mandatory provisions of law but similar attitude is demonstrated by such-like officers throughout the country 49th the result that number of accused persons have been rotting in the jails without trial and their such detention would be in clear violation of provisions of Article 9 of the Constitution of Islamic Republic of Pakistan as well as the principles of administration of justice in criminal cases.

13. This aspect of the case can also be seen from another angle namely that detention of the accused persons in jails for indefinite period without trial is also causing

innumerable problems including deteriorating law and order situation throughout the country because delay in submission of challan and commencement of trial provides as source of encouragement to the criminal-minded persons who know that despite their involvement in heinous offences no punishment could be awarded to them for a longer time for want' of commencement of trial after submission of challan and in the meanwhile when the police and prosecution agencies after great deal of difficulty decide to commence the trial, the accused persons manage to won over the prosecution witnesses either on account of being terror or by extending them monetary help or in such cases the witnesses feel insecure themselves if they depose against the criminals and if ultimately prosecution somehow succeed in enforcing attendance of the witnesses they half-heartedly depose against criminals resultantly the accused persons succeed in managing their escape from clutches of law on technical reasons and such illegalities and omissions had shaken confidence of the people over the institution responsible for conducting investigations as well as imparting justice to them. Although the problem has become complex in nature but instead of being disappointed from prevailing situation, devoted/sincere efforts should be made to strictly follow the provisions of law which definitely would restore the confidence of society so that stature of the institution and deteriorating position of law and order would also be controlled.

14. Before taking up other points involved in this case we consider it appropriate to note that delay in filing police report/challan is being caused for another reason namely that on the behest of the accused/complainant/State investigations in the cases are transferred from one police-agency to another under section 158, Cr.P.C. on account of showing non-confidence by one or the other party in the Investigating Agencies particularly in the Province of Punjab. Such device is followed invariably in every case and this reason independently also cause delay in submission of challan or commencement of trial of accused persons. We know that different investigating agencies cannot be debarred from carrying out repeated investigation of case as per direction of competent Authority with an object to find out truth and in such situation more than one police report/challan can be submitted before the trial Court in respect of one incident as it has been held in (i) Aftab Ahmad v. Hasan Arshad and 10 others (PLD 1987 SC 13), (ii) Mulazim Hussain v. S.H.O., Police Station Shorkot, District Jhang and 2 others (1995 PCr.LJ 440) and (iii) Muhammad Jamil v. S.H.O., Police Station Ahmadpur, District Sheikhupura (1997 MLD 2094). However, our emphasis is that notwithstanding the fact that before or after completion of investigation period prescribed under section 167, a Cr.P.C. if it is not possible to submit final report, the Investigating Agency should strictly adhere to the provisions of section 173(1), Cr.P.C. and must

submit interim challan through Public Prosecutor for trial and the accused arrested in the case should not be kept in custody for indefinite period `8 without any legal justification.

15. Learned counsel for Hakim Mumtaz Ahmad contended that vide impugned judgment bail granted to the petitioner has been cancelled because during pendency of Criminal Miscellaneous No.6606-B of 2000 before the High Court petitioner has secured his release on bail by means of order, dated 11th November, 2000 passed by Mr. Muhammad Alamgir Khan, the same Additional Sessions Judge at Mandi Bahauddin who had already rejected his bail application on 26th September, 2000. According to him as petitioner was in custody, therefore, request for his release on bail by moving fresh bail application through Advocate who was engaged to provide him legal assistance and if said counsel failed to bring the fact to the notice of Additional Sessions Judge that similar request for grant of bail to petitioner was also pending before High Court, the petitioner cannot be penalized for such conduct of the Advocate due to which the petitioner had suffered badly because bail already granted to him has been cancelled; whereas on the other hand no action has been initiated against the said counsel. He further stated that in spite of the fact that on account of omission

committed by the counsel or due to the reason that order of granting bail to petitioner on 11th November, 2000 has been passed, even then in suo motu exercise of jurisdiction it was obligatory upon learned Judges in the High Court to have examined the case of petitioner on merits because from the facts and circumstances of the prosecution case it would appear that the petitioner has been falsely involved in the case by the prosecution as initially a decoy customer was sent to the Dawakhana of petitioner to purchase opium from him and when he returned back with opium then immediately raid was conducted by the police on the shop of petitioner and allegedly recovered 142 grams of opium from the pocket of his shirt. He further contended that police had knowledge that raid has to be conducted on the shop of petitioner situated in a Bazaar, therefore, all the more it was necessary for the police to have complied with the provisions of section 103, Cr.P.C. to ensure independent recovery of opium from his possession.

Learned counsel for petitioner contended that as the prosecution case has become doubtful on account of non-examination of decoy purchaser and recovery of tainted money from possession of petitioner at the time of making his personal search, therefore, in view of the judgment in the case of Aamir v. The State (PLD 1972 SC 227) by extending benefit of such concession, bail be granted to the petitioner.

16. On the other hand Ch. Dil Muhammad Tarar, learned counsel for State argued that Additional Sessions Judge has granted bail to petitioner contrary to, his earlier order, dated 26th September, 2000 wherein while rejecting plea of petitioner for bail it was observed that petitioner could not offer any licence which authorized him to keep opium in his possession and while declining bail it was further observed that question of grant of bail or otherwise will be looked into after receipt of report from Chemical Examiner and submission of challan. According to him when application for grant of bail was repeated before the then incumbent Additional Sessions Judge he contrary to his earlier observations granted him bail. He also stated that in such-like situation instead of releasing the petitioner on bail Additional Sessions Judge tray have insisted upon the prosecution through S.P. to comply with the provisions of section 173, Cr.P.C. failing which he should have initiated action against them under the law. It was his further contention that learned Additional Sessions Judge even in absence of submission of challan within stipulated period may have examined the case of petitioner on merits keeping in view his earlier observations in order dated 26-9-2000. He was also of the opinion that there was strong evidence against petitioner to prima facie hold that he was involved in commission of non-bailable offence and merely for the reason that challan has not been submitted or trial of the case has not commenced, therefore, .the petitioner was not entitled for grant of bail.

17. Mr. Zahid Hussain Bukhari learned counsel who appeared on Court's Notice stated the petitioner was entitled for grant of bail because the manner in which the case was registered against him on the basis of information received from decoy customer that petitioner indulged in the business of selling opium has not been approved by the superior Courts. In support of his contention he referred to the judgment in the case of Muhammad Iqbal alias Bala v. The State (1989 PCr.LJ 1334).

18. It may be noted that petitioner was arrested by police in pursuance of F.I.R. No.358, dated 9th September, 2000, contents whereof reveal that it was registered on the information of a decoy customer who was sent to him for purchasing opium by making its payment through tainted currency notes The decoy customer visited the Dawakhana of petitioner and came with the information that petitioner deals in the business of selling opium and in pursuance of such information the police raided the Dawakhana of petitioner and recovered 142 grams of opium alongwith Rs.3,000 from the pocket of his shirt. It may be noted that neither statement of decoy customer, is available on record nor the police secured the purchased opium from him by means of an inventory. Similarly tainted currency notes handed over to petitioner by decoy customer for purchase of opium were also not recovered from him at the time of his

body search. Therefore, to this extent in absence of statement of decoy witness it would prima facie not be possible for the prosecution to establish accusation against the petitioner.

Now we are left with the second portion of the F.I.R. according to which on receipt of information from decoy customer Dawakhana of petitioner was raided and on his personal search 142 grams of opium along with Rs.3,000 were recovered from the pocket of his shirt. The alleged recovery of opium weighing 142 grams is stated to have been made in ~resence of police witnesses and not in presence of independent witnesses, onsidering that recovery was to be made in view of prior information which onduct of the police has been repeatedly observed by the superior Courts to e undesirable. Reference may be made to Mst. Fahmida v. The State (1997 CMR 947). It may be observed that petitioner in the bail application before ie learned Additional Sessions Judge as well as before the High Court sserted that he was 70/80 years of age and was falsely implicated and was fakeem. by profession. The petitioner was arrested on 10-9-2000 and was nlarged on bail on 11-11-2000 granted by the learned Additional Sessions adge, Mandi Bahauddin. The learned High Court recalled bail on 8-2-2001 ranted by the Additional Sessions Judge, Mandi Bahauddin and since then ie petitioner has remained in custody till this date. As per F.I.R. No.358 of 300 Police Station Mandi Bahauddin case against the petitioner was ;gistered for the offences under Articles 3 and 4 of the Prohibition :nforcement of Had) Order, 1979 and under section 9(b) of The Control of arcotic Substances Act, 1997. Article 3 deals with the prohibition of .anufacture of intoxicants, which in the instant case prima facie, would not
applicable. So far section 4 of .the said order if anybody possesses or ;cps in custody opium exceeding one kilogram he would be punished with iprisonment for life but in the instant case prosecution has alleged that 142 urns of opium was recovered from the shirt. of the petitioner, consequently e punishment provided would be to the extent of two years and with hipping not exceeding 30 stripes. So far section 9(b) of the Control of arcotic Substances Act, 1997, if any person is found in possession of .rcotic drugs exceeding one hundred grams but. not exceeding one kilogram, _
would be liable to sentence of imprisonment which may extend to seven ars and shall also be liable to fine. In the instant case the petitioner is eged to have been found in possession of 142 grams of opium, therefore. ing less than one kilogram he could be at the most sentenced to seven years
also with fine. In the circumstances the offences with which the petitioner charged would not fall within the prohibitory clause. It may also be noted e it the petitioner has remained in jail for about one year and the case has not)seeded so far and even charge has not been framed. Reference niay be ide to Liaqat Ali v. The State (D.B.) (1998 PCr:LJ 1444), wherein the :used was found in possession 500 grams of Charas who remained for six inths in jail and the maximum punishment provided for the offence being ,en years, he was granted bail. (ii) Muzaffar Shah v. The State (1998 'r. LJ 1540). There is nothing on the record to show that the petitioner is ely to .abscond or there is apprehension of his tampering with thelp isecution evidence or likely to repeat offence after his release on bail tsidering that applicant/petitioner is not stated to be a previous convict. ference may be made to Aslam alias Ashraf v. The State (1999 MLD 474). nay also be observed that mere fact that there has been delay in the receipt IE
(Iftikhar Muhammad Chaudhry, J)

of Chemical Examiner report of contraband would by itself not be bar to the grant of bail in case it is found that reasonable grounds exist for believing the accused is not .connected with the commission of offence. Reference may be made to Rajwali v. The State (1998 PCr.LJ 664). Mere fact that the learned Advocate for petitioner while filing application for bail before the High Court did not state about filing of another application for bail before the trial Court would not itself be ground to penalize the petitioner for the fault which F his learned counsel has committed in case reasonable grounds have been found to exist for the grant of bail in favour of petitioner.

19. In the circumstances, we are of the considered view that the petitioner has remained in jail for about one year and the offence alleged against the petitioner did not fall within prohibitory clause to section 497 of Cr.P.C. and the fact that respectable persons of locality in view of earlier information were not made witnesses of recovery, a case for further inquiry is made out.

20. We may note here that learned Additional Sessions Judge had knowledge that the case has been registered against the petitioner on 9th September, 2000 but despite lapse of period of 14 days under section 173(1), Cr.P.C. challan has not been submitted, therefore, he should have issued directions to the Investigating Agency through Public Prosecutor to submit interim final challan because as far as the investigation of the case is concerned probably it was completed on the same day when the petitioner was arrested and opium was recovered from his possession. As far as report of Chemical Examiner is concerned that could be submitted before the Court at a subsequent stage by filing supplementary challan but instead of doing so learned Additional Sessions Judge in pursuance of application for grant of repeated on behalf of the petitioner released him on bail vide order dated 11th November, 2000 solely for the reason that challan has not been submitted; whereas settled law is that non-submission of the challan under section 173(1), Cr.P.C. or commencement of trial under section 344, Cr.P.C: per se could not constitute a ground for grant of bail to an accused H under section 497(1), Cr.P.C. particularly in the matters where accused is involved in a heinous crime entailing punishment of imprisonment for life etc. as it has been held irk 1981 PCr.LJ 393 and, PLD 1992 Quetta 67. However, the trial Court on having noticed that challan has not been submitted and without it trial cannot commence should- have passed orders of mandatory nature directing the Investigating Agency for submission of challan under proviso to section 173(1), Cr.P.C. within three days positively in order to justify detention of the accused in custody and if after passing of clear direction prosecution had failed to take positive steps for submission of challan then the Additional Session Judge should have not felt hesitation in initiating proceedings against the S. H. O./Investigation Officer on account of non-compliance of the order of the Court and simultaneously he must have brought these facts in the notice of Superintendent of Police with the similar directions to him to do the needful and initiate action against the responsible persons who are responsible for not submitting the challan and if the S.P. had also failed to abide by the directions of the Court similar action should have also been taken against him as well.

21. Now we would advert towards the petition, which has been filed on behalf of Muhammad Alamgir Khan, the then Additional Sessions Judge, Mandi Bahauddin. Learned counsel contended that vide order dated 11th November, 2000 petitioner Additional Sessions Judge granted bail to Hakim Mumtaz Ahmad in good faith and without ulterior motives, therefore, without affording him appropriate opportunity of being heard the learned Judges in Chambers of Lahore High Court may have not recorded adverse remarks against him. In support of his contention he relied upon the judgments reported in (1) PLD 1963 SC 1, (2) PLD 1990 SC 1092 and (3) 1998 SCMR 485.

22. It is to be noted that learned Judges of the High Court issued notice to petitioner Muhammad Alamgir Khan, Additional Sessions Judge to explain his position vis-a-vis allowing bail to the said accused person within six weeks of his earlier refusal of the relief of grant of bail during the period when petition for his release on bail was also pending before the High Court.

23. The Additional Sessions Judge has filed reply to the notice dated 24-3-2001 wherein he offered explanation for granting to the petitioner. Relevant paras are reproduced hereinbelow :--

"3. The second application was moved by the accused having concealed the factum of pendency of bail petition before the Hon'ble Lahore High Court, Lahore. I was given to understand at the bar that due to personal grudge, the Investigating Officer did not pay any heed not only the Court's direction for submission of challan for over two months, but he did not even bother to collect the Chemical Examiner's Report and that he was out even to flout the Police Rules governing his job description. It was further stressed on behalf of the accused that non-submission of challan rendered the detention of the accused as illegal and that it was a fresh ground for bail because the same could not be deemed to be available at the time of filing of first bail application. Since, learned Prosecutor assisting from the record did not raise any cavil to the said contention, therefore, I gained the bona fide impression- that I could legally take up the second application for disposal in the light of relevant facts and circumstances of the case. Keeping in view the facts that even incomplete challan was not submitted within the prescribed period and the report of the Chemical Examiner was also not obtained in spite of my express direction and over two months had elapsed since after the registration of the case, the second petition was granted on the legal plane.

3. It may kindly be appreciated that accused had deliberately hood winked this Court by suppressing the fact of filing of bail petition before this Hon'ble Lahore High Court, Lahore. I may re-assure with all humility at my command that I can never conceive of even looking at a matter which is sub judice before the Hon'ble High Court. I sincerely and honestly' believe in a complete subordination to the esteemed superior Courts. "

24. After receipt of above reply, however, no action has been taken by learned Judges against petitioner and matter has been left for appropriate action against Muhammad Alamgir Khan, Additional Sessions Judge by the learned Chief Justice. Therefore, in view of the fact that notice was issued and reply of Additional Sessions Judge was obtained, it cannot be held that opportunity of hearing was not afforded to him.

It may be noted that judicial officers are not normally summoned by the superior Courts, to appear in person as per standing precedents and consisting practice keeping in view dignity of their high office unless the allegations are so severe like commission of contempt of Court etc. normally after hearing their view-points through comments filed by them the action is proposed if the stand taken by them therein is not satisfactory. In the instant case similar practice has been followed, therefore, judgments cited by Mr. Najumul Hassan Kazmi being distinguishable on facts need not to be discussed.

25. As a result of above discussion, we are not inclined to agree with the contention so put forward by the petitioner's counsel on his behalf about passing bail order, dated 11th November, 2000 in favour of Hakim Mumtaz Ahmad in good faith and non-providing him opportunity of hearing before proposing action against him by learned Chief Justice of the High Court. Essentially, if the learned Chief Justice decided to proceed against the petitioner hopefully, he will get fair opportunity to express his view-point to substantiate his plea.

26. We have discussed the significance and implications of non -submission of challan under section 173(1), Cr.P.C. and non-commencement of trial under section 344, Cr.P.C. hereinabove at length with a view to achieve the object for which provisions of law have been promulgated as it has been held by this Court in the case of Imtiaz Ahmad v. The State (PLD 1997 SC 545). Therefore, to censure strict compliance of section 173(1), Cr.P.C. in future, we- propose to pass following order in exercise of our jurisdiction under Article 187 (1) read with Article 189 of the Constitution of Islamic Republic of Pakistan:--

(1) Cr.P.L.A. No.236 of 2001 filed by Hakim Mumtaz Ahmad is converted into appeal and allowed. As a consequence whereof the interim bail granted to him vide order, dated 26th November 2001, is confirmed.

(2) Cr. P.L.A. No.669-L of 2001 filed by Muhammad Alamgir Khan, Additional Sessions Judge is dismissed with the observation made in para. No.25.

(3) The Inspector-General of Police, Punjab is directed to take action against Mr. Shafiq Ahmad, the then S.S.P., Mandi Bahauddin presently posted as S.S.P., Sheikhupura who failed to supervise investigation of the case effectively, as a result whereof submission of challan was delayed and petitioner Hakim Mumtaz Ahmed remained in custody for a considerable period without justification as his trial could not commence within the period of 14 + 3 days after completion of investigation. He would also take similar action against the then S.H.O. and Investigating Officer in accordance with the provisions of Punjab Police (Efficiency and Discipline) Rules.

(4) The Law Secretary, Government of Punjab is also directed to take action against Akhtar Hussain, District Attorney Mandi Bahauddin for not submitting the challan in the Court having jurisdiction within the stipulated period as he had been returning back the challan without any cogent reasons and due to his such conduct petitioner Hakim Mumtaz Ahmad remained in custody without trial for a considerable period.

(5) The Registrar of Lahore High Court will also bring this matter into the notice of Hon'ble Chief Justice for initiating action against the Magistrate who had been granting remand of the accused beyond the period of 14 days under section 173(1), Cr.P.C. without insisting upon the police to submit challan within stipulated period.

(6) Copies of this judgment shall also be sent to the Home Secretaries and Inspectors-General of Police of all the Provinces including Commissioner and Inspector-General of Police, Islamabad Capital Territory and Registrars of all the High Courts, for ensuring strict compliance of section 173(1) read with section 344. Cr.P.C. respectively so in future challans of criminal cases are submitted within the stipulated period of 14 days as provided under section 173(1), Cr.P.C. failing which action should be taken against the concerned officers for non-compliance of these directions.

27. Before parting with the judgment we would place our thanks on record for the learned counsel who appeared as amicus curiae on our notice and provided valuable assistance in disposal of these petitions.

N.H.Q./M-368/S

Bail allowed.

;