

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CRIMINAL APPELLATE JURISDICTION

CRIMINAL APPLICATION No. 56 OF 2014

Shailesh Kanada,
Age : 38 Years, R/o. : Flat No. 1001,
Habib Nagar CHS, Jijamata Road,
Pump House, Andheri (E),
Mumbai – 400093 (Presently in
Judicial Custody) ... Petitioner

Versus

1. Intelligence Officer,
Air Intelligence Unit, Customs
(FNO.SD/INT/AIU/128/2012
SU-III)
2. State of Maharashtra ... Respondents

WITH

CRIMINAL APPLICATION No. 221 OF 2014

Kailash Rajput,
Age : 43 Years, R/o. : 49/303,
Evershine Millenium Paradise,
Thakur Village, Kandivali (E),
Mumbai-400101 (At present
in Judicial Custody) ... Petitioner

Versus

1. Intelligence Officer,
Air Intelligence Unit, Customs
(FNO.SD/INT/AIU/128/2012
SU-III)
2. State of Maharashtra ... Respondents

Mr.H.H.Ponda with Mr.Ayaz Khan and Ms.Zehra Charania, Advocates for the applicant in APL/56/2014.

Mr.A.H.H.Ponda with Ayaz Khan and Ms. Mrudula Sathe, Advocates for the applicant in APL/221/2014.

Mr.S.K.Shinde, Special Public Prosecutor with Ms.Rebecca Gonsalves, Advocate for the Respondent No.1.

Ms.S.S.Kaushik, APP for the Respondent No.2 in both the applications.

CORAM : ABHAY M. THIPSAY, J.

Reserved on : 18th NOVEMBER 2014

Pronounced : 9th FEBRUARY 2015

ORAL ORDER :-

1 These two applications can be conveniently disposed of by this common order as the applicants in both these applications are accused in one and the same case i.e. NDPS Special Case No.51/13 pending before the Special Court for Narcotics cases at Mumbai, and the contentions raised are also the same.

2 The applicant - Shailesh Kanada (APL 56/14) is the accused No.3 while the applicant - Kailash Rajput (APL 221/14) is the accused No.2 in the said case. By these applications, invoking the inherent powers of this Court, the applicants pray that their prosecution vide the said case be quashed. In the alternative, the applicants pray that the order of cognizance as passed by the learned Judge of the Special Court be quashed and set aside, and that, by quashing and setting aside the order of the dismissal of their application for discharge as done by the learned Judge of the Special Court, the applicants be discharged from the said case.

3 The facts of the case, that it would be necessary to know in order to understand the contentions put forth by the applicants, are, in brief, as follows :

That, the officers of the Customs Air Intelligence Unit (respondent No.1) acting on prior information, intercepted and seized three courier parcels at the Export Hall of the Courier Terminal, Airport Mumbai at about 2.00 Hours on 26/09/2012. The said parcels had been booked by M/s. M.A.Express Logistics by using the License of M/s. Swift Clearing Agency (India) Private Limited destined for London. The said three courier consignments had been packed in three separate cartoons having their respective Air Weigh Bill Numbers Shipper and Consignee. That, the consignments were containing 10 packets each of Foodstuffs, Tea and Detergent in printed item packets. Thus, there were totally 30 packets. On opening out all the said 30 packets, each packet was found to be containing another silver pouch, containing white crystalline substance. The said substance was tested with the Narcotic Detection Kit and it was found to be *Methaqualone* – a Psychotropic substance. The said substance – said to be *Methaqualone* – weighed 14.9 kg. It was seized under a panchanama. Three samples of 5 grams each from every consignment were taken, and numbered as SA1, SA2, and SA3; SB1, SB2 and SB3; SC1, SC2 and SC3.

4 The other details with respect to the investigation and arrest of the applicants and the other accused i.e. Accused no.1 Ali Asgar Shirazi and accused No.4 - Sanjay Tamane need not be

mentioned here, and a mention of few relevant events and dates would suffice.

5 The applicant Kailash Rajput (Criminal Application No.221/14) was arrested on 23/10/2012. The applicant Shailesh Kanada (Criminal Application No.56/14) was placed under arrest on 21/12/2012. The accused no.1 Ali Asgar Shirazi was placed under arrest on 15/10/2012, while the accused No.4 - Sanjay Tamane was arrested on 23/10/2012. Investigation was carried out. The statements of the witnesses, as also of the accused persons were recorded in the course of investigation.

On 10/04/2013, the complaint vide N.D.PS.Special Case No.51 of 2013 came to be filed alleging that the applicants and the other accused had committed offences punishable under Section 29 read with Section 8-C and Section 22, and Section 22 read with Section 8-C of the Narcotic Drugs and Psychotropic Substances Act 1985 by acquisition and possession of *Methaqualone* powder which was a psychotropic substance. On 12/04/2013, the learned Judge of the Special Court took cognizance of the alleged offences on the basis of the allegation that the seized substance was *Methaqualone*, though no report from Chemical Analyzer in that regard was available.

6 The contention of the applicants is that their prosecution vide the said case is not in accordance with law. This needs to be understood and examined in the light of the following undisputed facts.

7 The complaint has been filed on the claim that the contraband involved was *Methaqualone* and that this was supported by the result of examination done with the help of Field Testing Kit. The complaint proceeds on the basis that the samples marked SA1, SB1, SC1 were sent to the Deputy Chief Chemist on 08/10/2012 and the report received from Dy.Chief Chemist indicated that '*for exact identification of the sample, more instrumental analysis, by I.R. Spectroscopy was required which was not available with Dy.Chief Chemist's Officer and so the samples might be forwarded to the Central Forensic Science Laboratory, Hyderabad (for short, 'CFSL')*'. That, the samples had been forwarded to the CFSL on 14/12/2012. Though efforts were made to get the Test Report from CFSL from time to time, the reports could not be obtained till the time of filing of the complaint. The complaint also mentions that even the Court had written a letter to the CFSL for speedy dispatch of the Test Report, but the Test Report was not received till the time of filing of the complaint.

8 When the complaint was filed in the Court on 10/04/2013, and when the question of taking cognizance of the alleged offences arose on behalf of the applicant, an objection was taken to the taking of cognizance, as is apparent from the order taking cognizance, itself. It was contended that in the absence of the report from the CFSL, there was no *prima facie* case against the applicants and the other accused. The contention of the learned Special Public Prosecutor, who appeared before the Special Court was that the report of the Field Testing Kit indicated the

substances seized to be *Methaqualone* and that this was 'sufficient for taking cognizance of the alleged offence'. The learned Judge of the Special Court, *inter alia*, observed that at the stage of taking of cognizance, the report of Field Testing Kit could be taken into consideration. The learned Judge categorically held that cognizance *could be taken and was being taken in the absence of report of CFSL.*

9 It appears that the applicants and the other accused then sought discharge from the Special Court. The main ground was the absence of the Chemical Analysis Report to support the allegation of the substance being *Methaqualone*. It appears that, at that time, bail applications filed by the accused persons were also pending. It appears that in the midst of the arguments, the learned Special Public Prosecutor in-charge of the matter, informed that the report of CFSL, Hyderabad was ready and would be filed. Accordingly, an adjournment was granted and the Chemical Analysis Report came to be filed. It was on 14-06-2013. This report indicated that *Ketamine* was detected in the sample SA/2 and *Methamphetamine* was detected in Samples SB/2 and SC/2.

10 After this twist in the matter, it was contended on behalf of the applicants that the Court had taken the cognizance of the alleged offence on the basis that the substance in question was *Methaqualone*; and since the CA Report did not support the said case of the complainant, there was no option for the Court, but to discharge the accused persons. The learned Special Public Prosecutor contended that even though the CA Report did not

speaking about *Methaqualone*, it spoke about *Ketamine* and *Methamphetamine*, which substances were also psychotropic substances; and that acquisition and possession of *Methaqualone* as well as *Ketamine* and *Methamphetamine* are punishable under the same provisions of the N.D.P.S.Act.

11 A question of entitlement of the accused to be released on bail in accordance with the provisions of the first proviso to Sub-Section (2) of Section 167 of the Code of Criminal Procedure (for short, 'the Code') was also raised before the Special Court. It was pointed out that one of the applicants was in custody for a period of more than 180 days, but no complaint had been filed with respect to the possession of *Ketamine* and *Methamphetamine*. The learned Judge of the Special Court observed that the point that arose was '*peculiar and rare*' '*requiring due consideration*'. Ultimately, however, by elaborate reasoning, he rejected the application for discharge, as well as application for release on bail. He was of the view that the report from the CFSL could be taken into consideration at the time of framing of charge.

12 The applicants, thereafter, had approached this Court also for bail, but they did not succeed.

13 I have heard Mr.H.H. Ponda, learned counsel for the applicant Shailesh Kanada (Application No.56/14) and Mr.A.H.H. Ponda, the learned counsel for the applicant Kailash Rajput (Application No.221/14). I have heard Mr.S.K.Shinde, learned Public Prosecutor with Ms.Rebecca Gonsalves, counsel for the respondent no.1. I have heard Ms.S.S.Kaushik, learned APP for

the State. I have carefully gone through the applications, and the annexures thereto.

14 The situation in which the applicants and the other accused (and even the prosecution – for that matter) are placed, is rather peculiar. The complaint that has been filed against them is on the allegation that the substance in question was *Methaqualone*. Though there was no Chemical Analyser's report stating that the substance seized was *Methaqualone*, and though it was contended by them that therefore, the cognizance of the alleged offence could not have been taken, the learned Judge of the Special Court did take cognizance relying on the report of the examination with the help of Field Testing Kit. Since the report from the CFSL, Hyderabad indicates the substance to be *Ketamine* and *Methamphetamine*, the result of the Field Testing Kit is admittedly, wrong. Once this is so, what is to be done of the complaint filed with respect to *Methaqualone* – the cognizance of which was taken on the basis of the result of the examination of the substance done by Field Testing Kit, is not easy to determine. The complaint can no more support this claim which is admittedly incorrect. However, the complaint still proceeds on that basis. So far as the substance *Ketamine* and *Methamphetamine* are concerned, no complaint against the applicants with respect to the possession or conspiracy to export those substances has been lodged till date. Thus, what is said in the complaint – about the identity of the substance – is wrong.

15 There is undoubtedly, something wrong about the prosecution. However, the matter may be left at that for the

present, as the main contention raised by the applicants is quite different. In the circumstances, it would be proper to come straight to it.

16 The main contention advanced by Mr.H.H. Ponda, the learned counsel for the applicants, is that, sending the second set of samples for re-testing to the CFSL, Hyderabad, was contrary to law and not permissible. He submitted that, even otherwise, the basis on which the sending of the samples for re-testing is sought to be justified, is also wrong, inasmuch as the circumstances put forth by way of justification for adopting such a course, did not exist.

17 It cannot be lost sight of that, as per the complaint itself, the claim that the substance in question was a psychotropic substance was made *only* on the basis of the result of the examination of the substance by the Field Testing Kit. That, there was no report in respect of Chemical Analysis of the said substance, was made clear in the complaint. For understanding how the absence of the report from Chemical Analyser was sought to be explained, it would be appropriate to reproduce here the relevant part of the complaint.

“The samples SA1, SB1 and SC1 were sent to Dy.CC on 8.10.2012. Test reports were received from Dy.CC stating that the samples are in the form of white crystalline powder. It is composed of Hydrochloride salt of Nitrogen bearing organic compound. For exact

identification of the samples U/R more instrumental analysis like IR Spectroscopy is required which is not available here at present. Therefore, sample may be forwarded to CFSL, Hyderabad.

Samples were forwarded to CFSL, Hyderabad on 14.12.2012. Efforts were made to get the Test Reports from the CFSL, Hyderabad from time to time. CFSL, Hyderabad informed that this office would be intimated as and when the Test Report would be ready. It may also be mentioned that even the Hon'ble Court directly wrote a letter to CFSL, Hyderabad for speedy dispatch of Test Report in the instant case, however, Test Report was not received till date” (Para 38)

18 Thus, according to the version in the complaint, the result of the test done by Dy.C.C was 'inconclusive', and that, that is why the samples were forwarded to CFSL.

19 In this regard, it is contended on behalf of the applicants that the report received from Dy.C.C was not, 'inconclusive' as falsely suggested in the complaint, and that actually, the report was negative for *Methaqualone*. In other words, the contention is that the assertions made in the complaint are misleading, and actually the report received from Dy.C.C indicated that the substance in question was **not** *Methaqualone*. It is

contended that the Court was misled as the data sheets in respect of the samples analysed by the Dy.C.C had not been filed along with the complaint, and that, they were not before the Court when it purported to take cognizance of the alleged offences. It is further submitted that, in these circumstances – and even otherwise – it was not permissible for the complainant to have forwarded the samples to the CFSL without the permission or order to that effect from the Court.

20 In view of the contentions raised, it would be proper to first examine whether the Dy.CC had not been able to analyze the samples and give any opinion, or whether, after having performed the necessary tests, had given a 'negative report' – so to say – with respect to *Methaqualone*.

21 The correctness of the contention advanced by Mr.H.H.Ponda that *when the trial Judge took cognizance of the alleged offences by an order dated 12th April 2013, data-sheets in respect of the samples analyzed by the Dy.C.C had not been filed along with the complaint*, is not in dispute. The said data-sheets were, admittedly, subsequently received and marked as Exhibit-5. It is contended that the data-sheets clearly show that the samples were thoroughly analyzed by the Dy.C.C. My attention is drawn to the findings of the Thin Layer Chromatography (TLC) test that had been carried out in two different systems 'A' and 'B', which are noted in the data-sheets as follows :-

“The sample u/r as well as standard sample of methqualone in methanol. The TLC spot of the

sample obtained in the above systems is not comparable with that of the standard *Methaqualone* used.”

(emphasis supplied)

22 Mr.H.H. Ponda, by relying upon the information in "*Forensic Science in Criminal Investigation and Trials*" by B.R.Sharma (Fourth Edition) [published by University Law Publishing Co.Ltd (page 24)] submitted that the procedure of Thin Layer Chromatography is to place the sample on one side and pure *Methaqualone* on the other hand on a silica gel plate having a particular solvent system. That, both the sample and the pure *Methaqualone* travel a particular distance. The distance travelled from the base to the spot is measured and compared, and on that basis, the result is given. According to Mr.Ponda, in the present case, the very fact that it is mentioned that 'the TLC spot of the sample obtained in the above systems is **not comparable** with that of the standard *Methaqualone* used' means that the two spots were not at the same level. According to him, therefore, it could easily be inferred from the said report that the substance was not *Methaqualone*.

23 There seems to be substance in this contention which was not even attempted to be dealt with or refuted by the learned Special Public Prosecutor.

24 Anyway, the main contention advanced by Mr.H.H. Ponda is that after receipt of the Dy. CC report, the act of sending samples SA2, SB2 and SC2 to CFSL Hyderabad on 12/12/2012

without obtaining orders from the trial court is *per-se* illegal. In support of this contention, he has relied upon the judgment of the Supreme Court of India in ***Thana Singh Vs. Central Bureau of Narcotics, 2013 (2) SCC 590***. Indeed, in that case, Their Lordships of the Supreme Court of India gave certain directions and guidelines to be followed during the trials of offences under the NDPS Act, in relation to a number of aspects. Their Lordships, *inter alia*, dealt with and went on to define the 're-testing rights'. Their Lordships observed : “the NDPS Act itself does not permit re-sampling or re-testing of samples. Yet there has been a trend to the contrary, and that the NDPS Courts have been consistently obliging to applications for re-testing and re-sampling”. It was also observed that the NDPS Courts were permitting re-testing by taking recourse to either some High Court judgments or sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940. Their Lordships thought it imperative to define re-testing rights, if at all, as an amalgamation of the factors mentioned by Their Lordships in paragraph no.24 of the reported judgment. It would be appropriate to reproduce the directions in that regard given in paragraph no.27 of the reported judgment.

“Therefore, we direct that, that after the completion of necessary tests by the laboratories concerned, results of the same must be furnished to all parties concerned with the matter. Any requests as to re-testing/re-sampling shall not be entertained under the NDPS Act as a matter of course.

These may, however, be permitted, in extremely exceptional circumstances, for cogent reasons to be recorded by the Presiding Judge. An application in such rare cases must be made within a period of fifteen days of the receipt of the test report; no applications for re-testing/re-sampling shall be entertained thereafter. However, in the absence of any compelling circumstances, any form of re-testing/re-sampling is strictly prohibited under the NDPS Act”
(Emphasis supplied)

25 Based on this, Mr.Ponda contended that sending of the samples for re-testing without the permission of the trial court would be *per-se* illegal, and therefore, the evidence obtained by sending samples for re-testing in violation of the aforesaid directions cannot be made the basis for prosecuting the applicants and other accused.

26 It was contended by the learned Special Public Prosecutor that the relevant observations have been made in the context of the applications for re-testing that are received from the accused persons, and would not be applicable where the prosecution decided to have such re-testing.

27 This contention does not appear to be correct. In the first place, these are not mere observations but 'Directions'. In

para 6 of the reported judgment, Their Lordships have made the following clear :-

“We lay down the directions and guidelines specified hereinafter for due observance by all concerned as the law declared by this Court under Article 141 of the Constitution of India. This is done in exercise of the power available under Article 32 of the Constitution for enforcement of fundamental rights, especially the cluster of fundamental rights incorporated under Article 21, which stand flagrantly violated due to the state of affairs of trials under the NDPS Act”
(Emphasis supplied)

The directions given by Their Lordships in **Thana Singh's** case (supra) cannot be construed as applicable only in cases where the re-testing is sought by the accused. There is nothing in these directions – or even in the other parts of the judgment in **Thana Singh's** case (supra) – to indicate that they were not intended to be applicable where re-testing is sought for by the investigating agencies. In this context, a reference may be made to a decision of the Punjab and Haryana High Court in the case of **Karan Kakkar Vs. Union Territory of Chandigarh, (Crl. Misc. No. M-19025/2013 decided on 3/10/2013)**, which has been relied upon by the learned counsel for the applicants. In that case, the order passed by the Judge of the Special Court, Chandigarh vide which the sample of the narcotic drug was directed to be sent for

re-testing at the instance of the Investigating Agency, was challenged before the High Court by filing a petition under section 482 of the Code. The Punjab and Haryana High Court, after considering the decision of the Supreme Court of India in **Thana Singh's** case (supra) held, that the order of permitting re-testing of the samples was bad. There were several other issues raised before the High Court, but what is relevant in the context of the argument advanced by the learned Special Public Prosecutor is that the re-testing of the samples at the instance of the investigating/prosecuting agency, was also held to be bad. Therefore, the contention that the observations made by the Supreme Court of India in **Thana Singh's** case would apply only when an accused makes an application for sending a sample for re-testing, cannot be accepted.

28 In this case, the samples were sent without obtaining any orders from the trial court. This, in any case, does not seem to be legal, permissible or justified.

29 A feeble attempt has been made by the learned Special Public Prosecutor in his oral arguments to come out of the rigours of the directions given and the observations made by Their Lordships of the Supreme Court of India in the aforesaid Case **Thana Singh** (Supra). It is contended that what was done was not 're-testing', but only 'a continuation of the original testing' as the report from the Dy.C.C itself mentioned that the 'samples may be forwarded to CFSL, Hyderabad'. It is not possible to accept this contention. Interestingly, as pointed out by Mr.H.H.Ponda, though the remnants of the samples sent back by the Dy. C.C were

sufficient to carry out the analysis, it was not that the very same samples were forwarded to the CFSL. It was the other set of samples that was forwarded to the CFSL, Hyderabad. The contention that there was no re-testing in this case and that what was done was a mere continuation of the initial testing, has no substance.

30 It may be observed that in the aforesaid case of **Karan Kakkar (supra)**, inspite of permission of the trial court having been taken for sending the samples for re-testing, such re-testing was held to be not permissible, as it had been done without giving any notice to the accused persons, and as it was not in conformity with the requirements laid down by the Supreme Court of India in the aforesaid case of Thana Singh (supra). In this case, obviously, the situation is worse inasmuch as no permission at all from the Court, was sought for.

31 Mr.Ponda submitted that the act of sending the samples for re-testing, without obtaining permission of the trial court, is contrary even to the standing instructions issued by the Director General of Narcotic Control Bureau, New Delhi. He has drawn my attention to the instruction at 1.21 in the standing instruction no.1/88 issued by the Director General of NCB, a reading of which leaves no manner of doubt that sending the duplicate sample for re-testing has been contemplated only on the trial court passing an order for a second test. Thus, a situation where the sample would be sent for re-testing without the order or permission from the trial court to that effect is not at all contemplated; and this speaks for itself.

32 With respect to the aspect of re-testing, the learned Special PP placed reliance on a decision rendered by the learned Single Judge of this Court in CRA No.424/09 decided on 30th July 2009 in support of a proposition that 'the provisions of the NDPS Act *prima facie* do not indicate any absolute bar for the prosecution sending samples to two different laboratories'. In the first place, this finding is tentative, as observed by the learned Judge herself in the order that came to be passed while dealing with an application for permission to go abroad during the pendency of the trial. Moreover, this decision has been rendered before the judgment in the case of **Thana Singh** (supra) was pronounced, and in view of the observations in **Thana Singh's** case (supra), insofar as they indicate that re-testing of samples cannot normally be done – (and if at all) can be done only under certain circumstances – also mentioned in the said judgment – no assistance can be derived by the prosecution from the said judgment. The learned Special Public Prosecutor also relied on another judgment delivered by another learned Single Judge of this Court in Writ Petition No.2911 of 2009 decided on 4th February 2010. Even this decision was rendered before the legal position was pronounced by the Supreme Court of India in **Thana Singh's** case. Moreover, in that case, the sample had been forwarded to another laboratory for re-testing by an order of the Court. From the observations made by the learned Single Judge in paragraph no.20 of the order, it appears that the learned Judge made a distinction between cases where re-testing was done after obtaining an order from the Court, and re-testing done without obtaining any order whatsoever from the Court. In any case, as observed earlier, after the pronouncement of law by the Supreme

Court in the aforesaid case of **Thana Singh**, the observations, if any, contrary to the legal position explained therein, found in the judgments of any High Courts, would no longer hold good.

33 After carefully considering the observations made in the aforesaid case of **Thana Singh**, the relevant provisions in the NDPS Act, and the standing instructions issued by the Narcotic Control Bureau, I am of the opinion that the act of sending the samples for re-testing to the CFSL, Hyderabad, without obtaining a permission or order from the Judge, Special Court, was illegal and not warranted by law.

34 After coming to the conclusion that the sending of the samples for re-testing was contrary to the law declared by the Supreme Court in **Thana Singh's** case (supra), and even the standing instructions issued by the Narcotic Control Bureau, the question that arises is whether the prosecution against the applicants should be permitted to be continued. It must be noticed that the position as of today is that the complaint still alleges that the substance in question was methaqualone, and that it was supported by the result of the examination of the substance done with the help of Field Testing Kit.

35 It is now obvious and conceded that the results of the tests done with the help of Field Testing Kit are incorrect; and today it is nobody's case that the substance in question was *Methaqualone*. *These results, therefore, cannot be – and have not been – relied upon.* The prosecution is *now* placing reliance on the results received from the CFSL, Hyderabad – as is evident from the

stand taken before the Special Court, while opposing the prayer for discharge and also before this Court during the present proceedings. However, the complaint continues to be on the basis that the substance in question is *Methaqualone*.

36 The learned Special PP, perhaps being unable to deal with the contentions raised by the learned counsel for the applicants specifically and directly, mainly emphasized that *similar contentions were raised by the applicants previously, while seeking bail, but that the said contentions were rejected by this Court*. He emphasized this aspect of the matter not directly, but by making a reference to the decision of the Supreme Court of India in ***Kalyan Chandra Sarkar Vs Rajesh Ranjan 2005(2) SCC 42***, and suggested that the applicants cannot be allowed now to raise the same grounds and same contentions.

37 I have, therefore, considered whether the points that are canvassed in the present applications were already raised before this Court, and have been dealt with by this Court. I am unable to hold so. That the contentions have been dealt with by this Court earlier, is claimed on the basis that in the bail applications filed by the applicants which were rejected by this Court, some grounds that have been raised now, were already raised. I have therefore, carefully gone through the order dated 18th February 2014 whereby the bail applications of applicant Kailash Rajput and other two accused in the case were rejected. It appears that those applications had been made on the ground that the said applicants were entitled to be released on bail under the provisions of section 167(2) of the Code as no complaint had been

filed against them with respect to the facts alleged, though they had been remanded into custody for a period of more than 180 days. The applicants' contention as raised before the Court was as follows :-

That the applicants were accused of having possessed *Methaqualone*, and that, that the substance in question was *Methaqualone*, was a claim said to have been supported by the result of examination done on the Field Testing Kit. The case against the applicant was that the reports from the Dy.C.C were 'inconclusive', and that report in respect of the other set of samples that had been forwarded to the CFSL, Hyderabad had not been received. Instead of waiting for the said report, the complaint came to be filed. That when the report came, it was revealed that one of the samples indicated positive for *Ketamine*, and the remaining two indicated positive for *Methamphetamine*. Thus, a peculiar situation arose viz:- 'that the complaint alleged the contraband to be *Methaqualone*, and the accused were being prosecuted on that basis, but the only material before the Court indicated the substance in question to be *Ketamine* and *Metamphetamine*'. The argument was that there had been no complaint in respect of *Ketamine* and *Metamphetamine*. It is on this basis it was claimed that since a complaint had not been filed with respect to the substances –

Ketamine and *Metamphetamine* -- the investigation ought to be treated as incomplete. It was thus claimed that in view of the provisions of section 167(2) of the Code, the applicants were entitled to be released on bail. This Court (Coram A.R.Joshi, J) took a view that cognizance had already been taken by the Special Court with respect to the allegation of the substance being *Methaqualone*, and though later on, it was revealed that the substance was *Ketamine* and *Metamphetamine*, these substances were also psychotropic substances punishable under the same provisions of NDPS Act as in case of *Methaqualone*. Based on a decision of this Court in ***Rafael Palafox Garcia Vs Union of India, (2008) 110 Bom.L.R.***, wherein it was held that cognizance of the alleged offence could be taken even without a Chemical Analyser's report, and only on the basis of the findings of the examination with the help of Field Testing Kit, the bail applications were rejected.

38 Some of the grounds urged in the said bail applications might be relevant in the context of some of the aspects of the matter which are being dealt with in the present applications, but what needs to be clearly understood is that the legality or validity of the act of sending the samples for re-testing was never challenged before this Court during those bail applications. The contention that there was a prohibition for sending samples for re-testing except under certain circumstances, and that no such circumstances existed and further, that in any case, samples could not be sent for re-testing without an order of the Court was never taken

during those proceedings. In any case, no such contention has been dealt with in the order rejecting the bail applications. What also needs to be kept in mind is that the contention that '*the Dy.CC report was not 'inconclusive', but was 'negative', was also neither advanced, nor dealt with by the Court while dealing with the Bail Applications*'. Therefore, the points that have been raised now require the entire case to be viewed in a different context, and in a different perspective. The question now is no more only with respect to the release of the applicants on the basis that the investigation was not complete. I therefore, find no substance in the suggestion – as implicit from the fact that reliance has been placed in the case of **Kalyan Sarkar** (supra) – that a consideration of the contentions advanced by the applicants would amount to a review of some previous observations made by this Court while rejecting the bail applications.

39 Having held that the action of the Investigating Agency in sending the samples for re-testing without obtaining any order from the Court, and even without giving any intimation to the Court, was clearly contrary to law and unjustified, the question that remains is whether the prosecution against the applicants is liable to be quashed on that ground by exercising the inherent powers of this Court.

40 The inherent powers of this Court saved by section 482 of the Code, are plenary. The powers have no limit once the conditions required for exercise of such power, exist. The inherent powers are to be exercised to prevent the abuse of the process of any Court, or otherwise to secure the ends of justice. They are

meant to be used when the proceedings initiated are not sustainable.

41 There is undoubtedly, a manifest defect in the prosecution of the applicants inasmuch as the same cannot succeed without establishing that the substance in question was psychotropic substance, and this aspect may be proved only if the report received from the CFSL, is taken into consideration. If the report obtained from the CFSL by doing re-testing of a second set of the samples without the leave of the trial court, and clearly in contravention of not only the law declared by the Supreme Court of India, but also the aforesaid 'standing instructions' is permitted to be the basis for the prosecution of the applicants and other accused, that would render the law declared by the Supreme Court of India, meaningless. Such a course, therefore, does not appear to be permissible. However, even then, I have examined the matter further from the point of view of fairness of the proceedings against the applicants. The question is whether the manner in which the applicants have been dealt with – and are being dealt with – is fair, just or reasonable.

42 In my opinion, the proceedings have been thoroughly unjust and unfair for a number of reasons.

43 In the first place, the data-sheets in respect of the examination/analysis of the samples done in the office of the Dy.C.C were not submitted along with the complaint, and an impression was given to the Court that the report was 'inconclusive'. The relevant part of the complaint has already been

reproduced earlier. The data-sheets were subsequently produced and they show that a thorough analysis in respect of the samples was done in the laboratory of the Dy.C.C. Indeed, the remarks in the data-sheets which have been reproduced earlier, show that the conclusion drawn by the Dy.C.C was that the substance in the samples was not comparable with that of standard *Methaqualone* used. The words 'not comparable', do not indicate that the analyst was unable to give an opinion whether or not the substance in question was *Methaqualone*. The use of these words in the light of the technique of Thin Layer Chromatography Test, as discussed earlier, leads to an inference that the conclusion that was arrived at was that the substance was not *Methaqualone*. The correct position appears to be that the substance was opined to be not *Methaqualone*, though what it was could not be exactly identified; and therefore, it was suggested that the same be forwarded to the CFSL, Hyderabad for 'exact identification'. Taking advantage of this part of the report, an impression was created – deliberately or otherwise – that the samples could not be properly examined or tested, and for the identification of the substance, the samples were required to be forwarded to CFSL Hyderabad. Had the data-sheets been produced along with the complaint, it might have been apparent to the Special Court that though the substance was not clearly identified, the tests performed showed it to be 'not *Methaqualone*'. There is a great difference in saying that the report in respect of the tests carried out, was 'inconclusive', and saying that it was found to be not *Methaqualone*, but for its exact identification, further tests, which could be carried out in the CFSL Hyderabad, were necessary.

44 The unfairness of the proceedings stands highlighted from the following. The prayer of one of the applicants and another accused for bail on the ground that they had been remanded into custody for a period of 180 days which was the maximum period during which the detention in custody, pending investigation could be authorized, was defeated on a wrong basis. Obviously, the prayer for bail was based on the fact that no cognizance of the alleged offences could be taken on the strength of the material before the Court which did not include a C.A. Report, and that therefore, though a complaint had been filed, actually the investigation was incomplete. The prayer for bail was turned down only because of the claim of the analysis done by Field Testing Kit having revealed presence of *Methaqualone* in the substance in question. Reliance was placed on the decision of this Court in *Rafael Palafox Garcia Vs Union of India (supra)* in support of this proposition. However, that the result of the Field Testing Kit which would be comparatively a cruder test was not supported by the analysis done by the Dy.C.C, was suppressed by giving an impression that the report of Dy.C.C was 'inconclusive'. Even assuming that there was no deliberate misrepresentation about what the report from Dy.C.C conveyed, and without going into the question of legality of the act of sending the second set of samples to the CFSL, Hyderabad for re-testing, what the prosecution was in the least required to do, was to admit that the analysis of the substance was still going on, and that till then, it had not been satisfactorily ascertained that the substance in question was indeed a narcotic drug or psychotropic substance. It need not be over emphasized that that the substance in question

was a psychotropic substance, was the very basis of the case, and though there was no satisfactory material to show this most basic aspect of the prosecution case, the detention of the applicant and other accused came to be authorized because of the unfair stand taken by the prosecution.

45 If the order dated 12th April 2013 passed by the trial court is examined, it is clear that a number of valid points were raised by the accused persons. That the investigation was not completed, and that no reliance can be placed on the results of Field Testing Kit, was contended by the learned counsel for the accused persons before the trial court. It was also contended that there were instances – by citing such instances – where the reports received from CFSL subsequently did not conform to the results said to have been obtained on examination by Field Testing Kit. The trial court observed, by referring to the observations made by this Court in the aforesaid case of **Rafael Palafox Garcia (supra)** that, at the stage of taking cognizance, the result of Field Testing Kit could be taken into consideration. Interestingly, the Court accepted the contention advanced by the learned counsel for the accused persons that in many cases, the results of CFSL were found to be different from that obtained by Field Testing Kit, but observed that :-

'presently there is sufficient evidence to show that *Methaqualone* was detected in the powder while carrying the test with the help of Field Testing Kit'. The parties can be heard when the report of CFSL is received on that point (paragraph no.10 of the order) (emphasis supplied)

If this was the reasoning with which cognizance of the alleged offences was taken, then when the report from CFSL, Hyderabad, revealed that the claim of *Methaqualone* having been detected in the powder was wrong, the learned Judge ought to have considered the fact that cognizance had been taken in a wrong belief. It ought to have been clear to the learned Judge that the contentions raised by the accused persons about the unreliability of the examination done with the help of Field Testing Kit were found to be correct, and that not relying on those contentions at that time, had caused prejudice to the accused persons. However, the trial court ignored that the basis on which it took cognizance was wrong, and had this been realized, it would not have taken cognizance, which, in turn, would have enabled the accused to derive the benefit of mandatory bail, or discharge. The detention of the applicants for a certain period was authorized on a wrong basis; and the attempt to show the detention to be rightful in the light of the subsequent revelations misses the fact that in the intervening period, the valuable rights of the accused were denied to them.

46 The laboratory of Dy.C.C, New Customs House, Ballard Pier is one of the laboratories mentioned in the said standing instructions No.1/88 issued by the Director of Narcotics Control Bureau as one of the laboratories to which samples of seized drugs may be sent for examination, and therefore, the suggestion that the said laboratory is ill-equipped to perform the necessary tests, cannot be easily accepted. (Interestingly, this was pointed out by Mr.Ponda in the context of a different contention viz. that the CFSL Hyderabad is not mentioned in the list of

laboratories, but I have not given much importance to that aspect). Even otherwise, the finding of Dy.C.C that the substance could not be identified as *Methaqualon* on TLC test being performed, stands confirmed by the report from CFSL, Hyderabad. If the approved laboratory was unable to opine the substance to be a psychotropic substance, the benefit of this ought to accrue to the accused, and not to the investigating agency.

47 The affidavit-in-reply is rather argumentative and emphasizes that cognizance was taken 'of the offences punishable under certain sections of the NDPS Act', thereby suggesting that what was the psychotropic substance in question, is immaterial. The affidavit in reply however, does not deal with the contentions raised by the applicants about the re-testing being impermissible and contrary to law. The reply also does not deal with the contention that the report from Dy.C.C was not 'inconclusive', but indicated the substance to be 'not *Methaqualone*'. When these contentions were specifically raised by the applicants by amending the applications, no further or supplementary reply was filed by the respondent no.1 in spite of having had sufficient opportunity to do so.

48 As a result of the aforesaid discussion, and a perusal of the record, as also keeping in mind the legal position as can be gathered from the authoritative pronouncements of the Apex Court, I come to the following conclusions:-

- (a) In the absence of any provision in the NDPS, Act enabling the investigating agency to do so, the sending of the second set of samples for re-testing to

the CFSL, Hyderabad was not permissible, except in accordance with the law laid down down by the Supreme Court of India in the case of **Thana Singh's case (supra)**.

(b) Without prejudice to the above, under no circumstances, the second set of samples could be forwarded to the CFSL without obtaining any permission from the Court.

(c) The report received from Dy.C.C was not inconclusive, as was suggested to - and believed by - the trial court. The report when considered in the light of the data-sheets indicates that the substance was not found to be *Methaqualone*, but what it was, could not be identified, and for exact identification, some further tests would be necessary for which the samples were required to be forwarded to the CFSL, Hyderabad. This is certainly different from saying that the report of analysis was 'inconclusive', particularly because the case was in respect of *Methaqualone*, and the substance was not found to be *Methaqualone*.

(d) The data-sheets had not been supplied to the Court, and therefore, it was possible to create such an impression in the mind of the trial court.

(e) The investigation was said to be complete and a case capable of taking cognizance of the alleged offence, was said to be made out only on the basis of the result of examination carried out with the help of Field Testing Kit. This result and the finding arrived thereby is now admitted to be incorrect.

(f) That the substance was *Ketamine* and *Metamphetamine* was revealed only on 12th June/ 14th June 2013 when a report to that effect from the CFSL, Hyderabad was received.

(h) The detention of the accused persons in the intervening period has been unfair and has resulted in causing prejudice to the accused as the plea of some of them for release on bail/or for discharge, was defeated by an assertion which is subsequently accepted to be wrong.

(i) Till date, no rectification of the incorrect claim made by the prosecution has been done and even today, the complaint proceeds on the footing that the substance in question, was *Methaqualone*.

49 In my opinion, such a prosecution which has glaring and manifest defects cannot be permitted to be continued. It is nothing but an abuse of the process of the Court. That the report from CFSL, Hyderabad discloses that *Methamphetamine* and

Ketamine were detected in the samples cannot come to the rescue of the prosecution to hold the present proceedings to be maintainable. The Investigating Agency has to blame itself for creating the present situation. Had it been sincere or careful, the Investigating Agency would have undoubtedly said that though the reports from Dy.C.C did not support the theory of the substance in question being *Methaqualone*, they still suspected the substance to be a psychotropic substance and that, its further analysis was being done. Had such a sober and reasonable stand been taken without filing the complaint hurriedly, at the most, some of the accused would have got the benefit of the mandatory bail, but a proper complaint could have been filed after receipt of the report from CFSL. Today, *if at all*, the applicants and the other accused are to be prosecuted, it can be done only on the basis that the *Metamphetamine* and *Ketamine* were detected in the samples. Undoubtedly, this can be done only by placing reliance on the report from the CFSL, Hyderabad; and the question as to 'whether the report, which has been obtained by re-testing done without any permission or order from the trial Court, can at all be looked into' would arise in that eventuality. Certainly, the observations made by me that 'the report of CFSL cannot form the basis for the prosecution of the applicants and other accused', have been made in the context of the present case, (where the complaint proceeds on the basis that the substance in question was *Methaqualone*) and may not be treated as conclusive or binding in the event of the question of prosecuting the applicant and other accused on the basis that *Metamphetamine* and *Ketamine* were detected in the samples, arising. It is because such a question can be best decided only when a complaint/prosecution to that effect is filed.

The Court concerned may decide the same at that time in accordance with law. The fact, however, remains that the present prosecution, as it is, cannot be permitted to be continued further.

50 Applications are allowed in terms of prayer clause a(i) which reads as under :-

“Quash the proceeding in N.D.P.S. Special Case No.51/03”.

51 The applicants be set at liberty forthwith.

52 At this stage, Mr.Rajesh Kumar, Preventive Officer, Customs, prays that the operation of this order be stayed for enabling the respondent no.1 to approach the Supreme Court of India against the same.

53 Prayer rejected.

54 However, in the circumstances, it is directed that the applicants shall execute a personal bond in the sum of Rs.1,00,000/- each before the trial court within a period of 7 days from today, binding them to remain present before the trial court in the event of the challenge that is intended to be given to this order, succeeding.

(ABHAY M.THIPSAY, J)