THE HON'BLE SRI JUSTICE C. PRAVEEN KUMAR

<u>CRIMINAL REVISION CASE Nos. 1390 and 1406 of 2015</u>

<u>COMMON ORDER :</u>

Crl.R.C.No.1390 of 2015 is filed by accused Nos.1, 4 and 5 where as Crl.R.C.No.1406 of 2015 is filed by accused No.6 assailing the docket order dated 24.06.2015 wherein the trial Court issued non-bailable warrants against accused Nos.1 to 7 while taking the second complaint on file.

The facts which lead to filing of both the revisions are as under:

On 22.03.2014 at about 2.00 p.m. LW.1 received an information that accused Nos.1 to 3 are illegally running a laboratory for illicit manufacture of Methamphetamine at first floor of Plot No.16, Ganesh Nagar, Old Safilguda, Hyderabad. After reducing the said information into writing and after obtaining the instructions of Superintendent, NCB, Hyderabad, the informant along with his team and panchas proceeded to the said spot. While climbing to the first floor, they found door of the room locked from outside and there was no name or room number mentioned on the door. On hearing some sound of machine from inside they break open the lock in the presence of panchas and entered into the room. They noticed that the said flat consists of three rooms which are interconnected with another exit. In the second room they found three persons operating a chemical apparatus of glass containers and rubber tubes and a motor was also running. There were many chemicals in plastic containers and plastic bags were also lying in the room. All the three persons disclosed their names and after serving notice under

Section 50 of N.D.P.S.Act, they were arrested. On enquiry, accused No.1 is alleged to have confessed that he, along with accused Nos.2 and 3, were manufacturing Methamphetamine from intermediates 1) Phenyl, (2) Propanone (P2P) and crude. In October, 2013 he had prepared 13 kgs. of P2P in R.S.Molecules factory, Jeedimetla along with accused No.2 and earned Rs.1.6 lakhs per kg. by selling the same to accused No.3. With the said money, accused No.1 is alleged to have set up a chemical lab at his mother's house. Motor and other equipments were provided by accused No.4, who is working in Sri Venkateswara Chemtech, Pashamylaram and accused No.5 is the Managing Director of the said factory. Accused No.6 was financially supporting accused Nos.1 to 5 for the manufacture of methamphetamine. Basing on these allegations a case in Crime No.NCBF No.48/1/1/2014/NCB/HYD came to be registered and all the accused were arrested. Police after investigation filed charge sheet which was taken on file as S.C.No.48 of 2014 on the file of the Metropolitan Sessions Judge, Cyberabad.

Thereafter, petitioners filed a petition under Section 227 Cr.P.C. in S.C.No.48 of 2014 seeking discharge from the case. The learned Special Public Prosecutor for the NCB reported no objection for discharging all the accused in S.C.No.48 of 2014 and as a result of which accused No.1 was discharged vide order dated 12.01.2015 passed in Crl.M.P.No.502 of 2014 and accused Nos.4 and 5 were discharged vide order dated 06.01.2015 passed in Crl.M.P.No.474 of 2014 and accused No.6 was discharged vide order dated 06.01.2015 passed in Crl.M.P.No.545 of 2014.

After discharge the prosecution received C.F.S.L. report on 30.05.2015 stating that the samples tested contain Amphetamine and Methamphetamine. On receipt of the C.F.S.L. report the prosecution filed a fresh complaint on 09.06.2015 which was taken cognizance on 25.06.2015 and numbered as S.C.No.57 of 2015. While taking cognizance, the trial Court issued non-bailable warrants against accused Nos.1 to 7. Challenging the same, the present revisions are filed.

Learned counsel for the petitioners mainly submits that the procedure adopted by the trial Court is unheard of in criminal law. He further submits that even assuming for the sake of argument that the Court has got the power to permit the prosecution to file a fresh complaint but issuing non-bailable warrant at the first instance itself is illegal and improper. He submits that invoking the provisions of Section 37-A of the Act, at that stage, without giving any notice to the accused, is also illegal and improper. He also submits without receipt of the C.F.S.L. report, the accused were un-necessarily detained on the ground that they were in possession of controlled substance. In that view of the matter he submits that the execution of warrants be stayed till the second report is obtained. In any event he submits that the total quantity of controlled substance will not be more than the commercial quantity, if proper analysis of the substance is done. In any event, he submits that Crl.M.P.No.468 of 2015 filed for sending the sample for re-testing is pending and till such time the execution of warrants may be stayed.

Learned Standing Counsel for the respondent opposed the application contending that in view of the findings of this Court in the earlier round of litigation and having regard to the fact that the analyst report is received, there is no illegality in issuing non-bailable warrant while taking cognizance of the fresh complaint. He submits that the respondent authorities cannot be blamed for rejection of the bail orders of the petitioners in the earlier round and the fact of earlier remand cannot be taken advantage for getting the execution of non-bailable warrant stayed.

It is to be noted that the petitioners have filed an application to send the samples to the C.F.S.L. for re-testing to find out the exact content of the controlled substance in the seized sample.

It is true in the earlier round of litigation, while dismissing the bail application of the petitioners, this Court held as under:

> 19. Once that is the case, the disclosure statement made by accused including under Section 67 of NDPS Act to the revenue intelligence department, the prosecuting agency is not shown at par with statement to regular police and thus admissible within the purview of Section 124 of Evidence Act and neither hit by Section 25 of Evidence Act totally or even to the extent other than the disclosure of the facts admissible under Section 27 of Evidence Act being exception to Section 25 of Evidence Act vide Rajkumar Karwal followed in Kanhailal (supra). When such is the case and the same is admissible and relevant, it is not just for this Court in the bail application to ignore the same or to answer the contentions raised of the so called statements or part of the same, as disclosures tantamounts to confession by accused persons, rule of prudence requires corroboration to it to rely within the prerogative in appreciation of evidence during trial as some expressions say confession can be a sole basis and some expression say rule of prudence require corroboration to it. Further, the observation of the learned Sessions Judge of Section 37 has no application is not correct, when it speaks the bar for the commercial quantity offences, leave about other specified sections referred therein and when conspiracy, preparation and attempt are the offences provided for punishment, when these offences shown involved for commercial quantity, the bar applies, but for if at all to say other than for conspiracy provided with punishment at par with substantive offence in the sentencing policy, from lesser sentence to preparation

and attempt not outcome of conspiracy, to give such interpretation beneficial to the accused from the two views possible as per the cordial principle in the criminal jurisprudence. This conclusion can be taken support from the expression of the Apex Court in **Dadu Alias Tulsidas Vs. State of Maharashtra**[1] while holding Section 32-A NDPS Act imposing bar against Section 389 Cr.P.C for bail and suspension of sentence pending appeal is even unconstitutional; (which is also pending in reference from conflicting expressions in this regard) so far as parameters for bail pending appeal concerned, the norms of Section 37 NDPS Act must be followed for no other procedure of the twin requirements of the satisfaction of the Court mandatory being sina qua non of 1) there are reasonable grounds for holding that the accused is not guilty of such offence and 2) that he is not likely to commit any offence while on bail vide **Union of India vs. Rattan Malik**[2] **; Union of India vs. Shri Shiv Shankar Kesari**[3] and **Ratan Kumar Viswas vs. State of UP**[4]**.”**

As seen from the record, accused Nos.1 to 3 were arrested on 22.03.2014 when the officers conducted raid on the premises of the accused. Accused Nos.4 and 5 were arrested on 23.03.2014 and accused No.6 arrested on 08.06.2014. Bail applications were filed before the trial Court and the High Court but the same were dismissed on the ground that the property which was seized from the accused was a prohibited substance. Subsequently in the month of January, 2015 accused No.1 filed Crl.M.P.No.502 of 2015 in S.C.No.48 of 2014 seeking discharge from the case on the ground that P2P by itself is not a controlled substance. Much prior to filing of application by accused No.1, accused Nos.4 and 5 also filed Crl.M.P.No.474 of 2014 and during the course of arguments of the said applications, the learned Public Prosecutor has endorsed that the prosecution may be given a liberty to file a fresh complaint after P2P report or material evidence is collected. Similarly, accused Nos.3 and 6 filed Crl.M.P.Nos.503 of 2014 and 545 of 2014 seeking discharge wherein similar endorsement was made by the learned Public Prosecutor. Having regard to the endorsement made by the Public Prosecutor stating that he has no objection for discharge of all the accused, since P2P is not a controlled substance and possession of it is not an offence, the trial Court allowed the discharge petitions giving liberty to the respondents to file a fresh complaint against the accused if any fresh material is found against the accused. All the accused were set at liberty pursuant to the orders of the Sessions Court.

Thereafter, the prosecution received the C.F.S.L. report dated 30.05.2015 in respect of samples which were taken in the month of March, 2014. The Analyst report show that the samples contain Amphetamine, Methamphetamine and P2P etc. After receipt of the said report dated 30.05.2015, the prosecution filed fresh complaint on 09.06.2015 which was taken on file as S.C.No.57 of 2015 and non-bailable warrants came to be issued against all the accused.

It is to be noted that from the date of arrest till date of discharge all the accused were in jail. As stated earlier the applications for bail filed by the petitioners were rejected on the ground that in the month of October, 2013 accused No.1 prepared 13 kgs. of P2P along with accused No.2 and selling the same to accused No.3 for preparing Methamphetamine. Accused No.4 was found in Sri Venkateswara Chemtech, Pashamylaram, Phase-I, Medak District where he is alleged to have manufactured the crude item and about 99 kgs. of by product was found in three bags. Accused No.5 is said to be the Managing

Director of the said factory. The record also shows that accused No.6 was financially supporting accused Nos.1 to 5 for manufacture of Methamphetamine.

As endorsed possession of P2P by itself is not an offence, but the product which has been sent for analysis is said to contain Amphetamine, Methamphetamine, P2P in S1, S.3, S.11 and S.13, but the analyst report is silent as to the percentage of the prohibited substance in the sample analysed. Hence, the accused are said to have filed Crl.M.P.No.481 of 2015 before the Sessions Court for re-testing of the samples to know the exact percentage of prohibited substance.

The issue as to whether the provisions of N.D.P.S.Act permit sending of second sample for analyst came up for consideration before the Apex Court in ***Thana Singh v. Central Bureau of Narcotics (2013 (2) SCC 590).*** In the said case the Apex Court held as under:

> "23. The NDPS Act itself does not permit re-sampling or re-testing of samples. Yet, there has been a trend to the contrary; NDPS courts have been consistently obliging to applications for re-testing and re- sampling. These applications add to delays as they are often received at advanced stages of trials after significant elapse of time. NDPS courts seem to be permitting re-testing nonetheless by taking resort to either some High Court judgments [See: State of Kerala Vs. Deepak. P. Shah[5]; Nihal Khan Vs. The State (Govt. of NCT Delhi) [6]] or perhaps to Sections 79 and 80 of the NDPS Act which permit application of the Customs Act, 1962 and the Drugs and Cosmetics Act, 1940. While re-testing may be an important right of an accused, the haphazard manner in which the right is imported from other legislations without its accompanying restrictions, however, is impermissible. Under the NDPS Act, re-testing and re-sampling is rampant at every stage of the trial contrary to other legislations which define a specific

> time-frame within which the right may be available. Besides, reverence must also be given to the wisdom of the Legislature when it expressly omits a provision, which otherwise appears as a standard one in other legislations. The Legislature, unlike for the NDPS Act, enacted Section 25(4) of the Drugs and Cosmetics Act, 1940, Section 13(2) of the Prevention of Food Adulteration Act, 1954 and Rule 56 of the Central Excise Rules, 1944, permitting a time period of thirty, ten and twenty days respectively for filing an application for re- testing."

After referring to Section 52-A of the Act, the Apex Court held as under:

> "25. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the concerned laboratories, 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."

It is true that as observed by the Apex Court the application has to be made within a period of 15 days from the date of receipt of the test report. As seen from the record, the analyst report is dated 30.05.2015 and the application under Section 52-A of the Act for re-testing of the sample appears to have been filed with some delay. But the accused, who were in jail, were not aware about the receipt of the analyst report and according to them it came to their knowledge after filing of the second complaint. Therefore, it cannot be said that the application was made as a matter of course and with an intentional delay.

Hence, the trial Court is directed to dispose of Crl.M.P.No.481 of 2015 within a period of four months from the date of receipt of a copy of the order. Till such time the execution of non-bailable warrants issued on 24.06.2015 shall be stayed. However, the petitioners shall appear before the trial Court on every date of adjournment and make themselves available as and when required by the Court. If the Court comes to a conclusion that there are no merits in Crl.M.P.No.481 of 2015, the trial Court is at liberty to pass orders in accordance with law either with regard to execution of warrants or otherwise.

With the above directions, both the Criminal Revision Cases are disposed of.

Consequently, the miscellaneous petitions, if any, pending shall stand closed.

C.PRAVEEN KUMAR,J

12.04.2016

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[1] 2000 Crl J 619

[2] 2009 (2) SCC 624

[3] 2007 (7) SCC 798

[4] 2009 (1) SCC 482