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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

Date of decision: 19.09.2019

+ CRL.REV.P. 834/2017

T LETMINLEN HAOKIP & ANR

..... Petitioners

Through: Mr. Sundeep Srivastava, Mr. R.A.
Worso Zimik & Mr. Paran Kumar
Srivastava, Advs.

versus

CUSTOMS

..... Respondent

Through: Mr. Harpreet Singh, Sr. Standing
Counsel with Ms. Suhani Mathur,
Adv.

CORAM:

HON'BLE MR. JUSTICE SURESH KUMAR KAIT

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J U D G M E N T (O R A L)

Vide the present petition the petitioners seeks directions thereby to set aside the order dated 04.08.17 passed by learned Additional Sessions Judge, Special Judge (NDPS), Dwarka District Court, Delhi in S.C. No.440324/16, whereby charges have been framed against the petitioner/revisionist for the offence punishable u/s 21(c), 23, 28 & 29 of NDPS Act, 1985.

Case of the Petitioner is that on 01.12.2010, consignments for Singapore were intercepted at the Airport wherein the consignments were declared to be as Cosmetics items in the name of; 1. John Keneddy, 358 Alfreton Road, NG75NE, Nottingham, UK and 2. Ibonn Godlip,

ARADUSVOGELHOF, 1221 LL Hilversome, Holland. On 02.12.2010, Sh. Deepak Jaiswal handed over both the parcels and two independent witnesses were called and in their presence, the boxes were opened. It is alleged that the First Box weighed 3.50 Kg, X-Ray was conducted and some sort of concealments were found, therefore, the box was opened wherein 204 Pieces of cosmetics including lipsticks were found. Thereafter, the back side of the box was opened wherein a small packet wrapped in carbon paper was found. However, when the entire packet was opened "Brown Colored Powdery Substance" was found in it. All packets contained the same powder, accordingly, small quantity of the same was tested in Ion Scan. Total weight of the Powder was 451 gms and 3 representative samples of 5 gms were drawn and kept in separate envelopes and were sealed. Balance 436 gms was kept in a separate polythene pouch and sealed with customs seal. One sealed sample was handed over to DHL as custodian and two sample parcels were kept by customs.

The Second Box was also opened, inside which Brown Colored Powdery Substance was found, net weight of which was 874 gms. Out of the total 874 gms of substance, 3 samples of 5 gms each were made. On 02.12.2010, the Accused/Revisionist No.2 made a call to DHL Office Dehradun and the official of DHL informed that there was problem in ID. Accordingly, the Revisionist No.2 gave address of Delhi to collect the ID.

Learned counsel appearing on behalf of the petitioner submits that raid was conducted at the address of the Revisionist No.2 but nothing incriminating was found. One Mr. J Changthan was called for interrogation u/s 67 NDPS and during interrogation, he informed that Revisionist No.2 lived in his house as tenants but he was not residing currently in his house.

Mr. J Changthan gave another address of the Revisionist No.2. The raiding officials visited the said address, but nothing incriminating was found there as well. While coming back, the raiding officers saw Revisionist No.2 who was intercepted and notice was served upon him. He gave statement voluntarily wherein he intimated that both the parcels were received from Mr. Minlen /Revisionist No.1 who worked for Ms. Lalramngai. Revisionist No.2 took the officers to the house of the Revisionist No.1 but the Revisionist No.1 could not be found at his house. During the raid conducted at the said address, the officers found one letter from Ms. Lalramngai. Search was conducted at the said address and during the search, documents pertaining to the Shipment were found.

Learned counsel appearing on behalf of the petitioner submits that neither the statement of Revisionist No. 1 nor that of Ms. Lalramngai were on record nor any document which shows that efforts were made to place them on record. On 04.12.2010, statement of the accused was recorded voluntarily. Mr. Krishna Kant Kumar executive of the DHL was interrogated by the officials. On 06.12.2010 one Mr. Yogeshwar Prasad Inspector was authorised to deposit the samples at CRCL Delhi for testing. On 28.01.2011, first FSL report was received from the CRCL Delhi which observed that "the presence of Heroine could not be ascertained". Remaining gross weight of remnant sample was 4.54 gms which was returned in a plastic pouch with a note: "For further opinion, the samples may be forwarded to CFSL Hyderabad or any other Govt. laboratory, if required".

The counsel for the petitioner further submitted that the prosecution on its own sent the remaining sample to CFSL Hyderabad for further testing

on 15.02.2011. However, vide letter dated 18.02.2011, Hyderabad CFSL refused to analyze the remnant samples for the reason that the re-examination could not be done without the court order and the documents were not bearing intact specimen and seals of CRCL, as well as an authorisation with the documents was not enclosed. Consequently, on 14.03.2011, two fresh samples of 4.5 gms and 5.6 gms respectively, were sent to check the presence of Opium / THC, Cocaine, Morphine, Catamine or any other narcotic drugs, which was followed by a reminder dated 15.04.2011.

He further submitted that as per the report dated 11.05.2011, presence of Heroine, Opium / THC, Cocaine, Morphine, Calamine could not be ascertained and the packages with gross weight of 2.6 gms and 3 gms each were returned. However, on 23.05.2011, the Ld. Trial Court passed an order on the Application moved on behalf of the prosecution seeking direction for retesting of the sample at CFSL Hyderabad wherein the Hon'ble Court has allowed the same. Pursuant to the order dated 23.05.2011, fresh samples of 4.33 gms and 5.36 gms were sent to CFSL Hyderabad for analysis, which was highly objectionable, for the reason that the prosecution has no authority to procure fresh samples from the case properties. The CFSL Hyderabad vide its report dated 06.06.2011, observed that "*No Narcotics except Caffeine*" was found in the samples and the same, gross weight of 24.18 gms. and 4.98 gms. each were returned. On 13.06.2011, again an application under Section 36 A (4) of NDPS Act for extension of period of investigation and another application seeking permission for draw of fresh sample from the seized substance and testing at CFSL Hyderabad was moved by the prosecution which was allowed by the Ld. Trial Court vide

order dated 13.06.2011 and the matter was adjourned to 28.06.2011. Though the matter was posted for 28.06.2011, the prosecution with mala fide intention and to prove its case has filed an application for fresh samples, which was allowed by the Ld. Trial Court without the notice to the counsel for the accused and on 14.06.2011, fresh samples were drawn without notice to the counsel for the petitioner/accused. Pursuant to the order dated 14.06.2011, another request for fresh samples was sent on 15.06.2011 followed by a reminder dated 22.06.2011. The CFSL Hyderabad vide its report dated 24.06.2011 has observed that the samples were found positive for the presence of "*Phenobarbitone and Caffeine*" and since the substance as suggested by the CFSL Hyderabad was covered under the Item No. 69 of the schedule relating to psychotropic substance under the NDPS Act, the petitioner/accused was held guilty of offences punishable under Sections 22, 23, 24 and 29 of NDPS Act.

Learned counsel further submits that the CFSL Hyderabad vide its letter dated 14.07.2011 had written to the Assistant Commissioner, Customs, New Delhi that Phenobarbitone and Phenobarbital are the same substance. The CRCL, New Delhi vide its letter dated 15.07.2011 had written to the Assistant Commissioner, Customs, New Delhi that Phenobarbitone is a synonym of Phenobarbital. Thereafter, the petitioners filed an application for bail which was listed before Special Judge, NDPS, ASJ, Dwarka Court and the learned Judge after hearing the argument as well as reply filed by the prosecution was pleased to allow the said bail application vide order dated 02.09.2011, by observing that "*the discrepancies in the reports of the samples which were drawn earlier from the recovered substance and the samples which were drawn later on with the permission of the Court Creates*

a reasonable doubt in the mind of the Court about the truthfulness of the case of the prosecution", hence the Petitioner deserves to be released on bail from the present matter.

The prosecution after completion of investigation filed the charge sheet and against the order dated 02.09.2011, preferred a petition U/s 482 Cr.P.C. vide Crl.M.C.No. 325/2012 for quashing of the order dated 02.09.2011 granting bail to the petitioners. However, the said application was dismissed by this Court vide order dated 20.07.2015.

The present petition is filed on the ground that the first sample sent by the prosecution had failed vide its report dated 28.01.2011. Thereafter, the prosecution with permission had, sent second sample, however vide report dated 11.05.2011, the CFL reported that there is no substance in the sample, thus, the second sample also failed. Again the prosecution sought permission from the court for a third test to be conducted and the same was granted and in the test report of the third sample, the only substance found was caffeine. Thereafter, they again sought permission from the court and in the fourth report, the two substances found were caffeine and phenobarbitone.

Learned counsel submits that sending a sample for re-examination is contrary to the Act as there is no provision therein. However, if the court found substance in the submission of the prosecution, the trial court may send the sample for retesting. But the re-testing should be based on some ground. For example, if the sample could not be tested; the reason must be that the sample sent for test was of inadequate quantity or some other reason. However, if a report is there, which specifically mentioned that there is no substance then, even courts have no power to send the sample again for re-testing. Thus, the counsel for the petitioner submits that the

second, third and fourth reports are contrary to the practice, procedure and the NDPS Act. However, the trial court has ignored this fact and framed the charges against the petitioner.

On the other hand, learned counsel appearing on behalf of the respondent submits that since the first test failed, thereafter the prosecution moved an application for sending the second sample and same was granted by the court. He further submits that when the third sample was to be sent, two permissions were sought; one was for extension in filing of charge sheet and second was for sending the fresh sample for re-examination but in the said report dated 06.06.2011, substance found was caffeine only. Thereafter, they further sought permission from the court and fresh sample for the fourth time was sent and thereon, two substances were found on 24.6.2011, one; caffeine and another was phenobarbitone. Thus, he submits that there is no ground in the present petition and same deserves to be dismissed.

However, a decision of this Court rendered in the case of **Nihal Khan v. State (Govt. Of NCT of Delhi)**, (2007) SCC Online Del 14; cannot be ignored, whereby the law with respect to the directions given for the sending of a second sample for testing under Narcotic Drugs and Psychotropic Substance Act, 1985 was stated as under:

“16. In the light of the aforesaid discussion and reasoning, it is clear that there is no bar for an accused under the NDPS Act to move an application for re-testing of samples. There is also no bar on the court allowing such an application. At the same time, it does not mean that every such application moved by any accused under the NDPS Act ought to automatically result in the court allowing the same. The court has the power to allow or not to allow such an application. It has to consider

the facts and circumstances of the case and to see whether re-testing would be necessary to secure the ends of justice and to afford a fair trial to the accused. If the court, upon considering the totality of circumstances, comes to the conclusion that re-testing would be necessary, then it ought to allow such an application. An illustration of a case where re-testing would be necessary is one given by the decision in Masoom Ali (supra) where the first test did not disclose the percentage content of diacetylmorphine and the second test became necessary for ascertaining the exact content so that the category of the offence under Section 21 of the NDPS Act could be ascertained. Another situation where re-testing could be permitted is as given in Kailash Singh's case (supra) where doubts are created with regard to the tampering with the case property and or samples. In such a situation where legitimate doubts arise, the court may permit re-testing. A third situation may be where in the course of the trial it is indicated that there is a possibility that the sample sent for testing did not match the case property. This can be discerned sometimes by marked differences in colour or other appearance to the naked eye. In all such situations, it would be permissible for the court, if it so feels, to direct re-testing. These instances are merely illustrative. There may be other situations where it would be necessary for the court to direct a fresh sample being taken from the case property and being sent for testing if it feels that it would secure the ends of justice and help the court in arriving at the truth.”

It is a settled principle of law that “ignorance of law is not an excuse” and that illegality if committed cannot be allowed to continue. However, the learned trial court in haste to charge the petitioners, seems to have completely overlooked the said principle of law. It is evident from the fact that despite a permission of re-sampling, learned judge continued to demolish the arguments of the counsel for the petitioner/accused based upon the judgement of Supreme Court in ***Thana Singh v. Central Bureau of***

Narcotics (2013) 2 SCC 590 on the ground that re-sampling was done in the year 2011, whereas the said judgment was delivered in 2013. However, the learned trial judge failed to realise that NDPS Act and its provisions have been in existence since 1985 and that the court is bound by the provisions of said act and it is incumbent upon the trial court to apply the same but the trial court continued to charge the petitioners for the offences mentioned in the charge sheet.

The learned trial court also ignored the fact that the bail granted to the petitioners was upheld by this court on the ground that sampling was done more than once and there were discrepancies on the reports of the same. It clearly creates doubt on the case of the prosecution whereas, the learned judge passed the impugned order and completely ignored the said observation and proceeded to state that the orders of the re-sampling, since not challenged by the petitioners, have attained finality.

Moreover, the learned judge has ignored the report dated 24.6.2011 in which the existence of phenobarbitone was found and the same was based on a fresh sample which was drawn without putting it in the notice of the accused on 14.6.2011, despite the order for re-sampling was earlier passed vide order dated 23.05.2011.

It is pertinent to mention here that it is the duty of the courts, in the interest of justice, to understand that why the fresh samples were drawn on a date which was not in the knowledge of the petitioner/accused. Thus, raising a doubt on the entire process and bonafide case of the prosecution and that such discrepancy and illegality would ultimately result into the acquittal of the accused and therefore, there is no purpose of charging the accused and exposing them to the further harassment of trial which they have been facing

since 03.12.2010.

Since the first three samples totally failed, therefore, there was no occasion for sending the fourth sample for retesting.

It is not out of place to mention here that a third sample was tested by CFSL Hyderabad, whereby it was stated that there is no substance except caffeine in it. The same laboratory in the fourth report stated that there are two substances i.e., caffeine and phenobarbitone. Thus, it creates doubt on the prosecution whether the samples were sent of the same substance. However, without pointing out on the attitude of the prosecution authority, I am of the opinion that even re-testing is not permissible until and unless it is allowed by a reasoned order. In case of **Thana Singh v. Central Bureau of Narcotics** (2013) 2 SCC 590, the Hon'ble Supreme Court has held that:

“27. Therefore, keeping in mind the array of factors discussed above, we direct 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.”

Accordingly, in view of the above facts and circumstances and the settled position of law, the order on charge dated 04.08.2017 is hereby set aside and the petitioners are discharged from the offences mentioned above.

The petition is accordingly allowed with costs of ₹ 50,000/- to be paid

by the Respondent in favour of ‘Delhi High Court Legal Services Authority’ within 2 weeks from today, failing which, the Registrar General of this court shall ensure the recovery of the cost amount as per law.

Copy of this order be sent to all the District and Session Judges for information, who in turn shall send the same to all concerned.

Order *dasti*, under the signatures of Court Master.

(SURESH KUMAR KAIT)
JUDGE

September 19, 2019/k

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