

**IN THE HIGH COURT FOR THE STATES OF PUNJAB AND
HARYANA AT CHANDIGARH**

**CRR No. 4493 of 2018
Reserved on : 02.03.2020
Pronounced on : 04.03.2020**

Chander Parkash @ Chander

...Petitioner

Versus

State of Punjab

...Respondent

CORAM: HON'BLE MR. JUSTICE ARVIND SINGH SANGWAN

Present:- Mr. Rajiv Kataria, Advocate
for the petitioner.

Mr. Joginder Pal Ratra, DAG, Punjab.

ARVIND SINGH SANGWAN, J.

1. Prayer in this revision is for setting aside the order dated 26.11.2018, vide which the trial Court has framed charge against petitioner Chander Parkash @ Chander, under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (*for short 'NDPS Act'*).
2. Brief facts of the case are that the petitioner, along with one Jaswinder Singh @ Bhinder, was nominated as an accused in FIR No. 40 dated 03.06.2012, registered under Section 21 of the NDPS Act at Police Station Sadar Nabha, District Patiala.
3. During the course of investigation, the sample parcel, prepared by the Investigating Officer, was sent to Chemical Examiner, Kharar and on 18.07.2012, a report was sent by the Chemical Examiner, Kharar (Annexure P-2), in which the contents of the sample were found to be “*Paracetamol*”. Thereafter, the prosecution moved an application

(Annexure P-3) before the Special Judge to get the second sample analyzed from any other laboratory. As per application dated 11.01.2013 (Annexure P-3), it is stated that the Investigating Officer has prepared two samples of 10 grams each in separate parcels, which were sealed by the seal of Investigating Officer 'GS' and later on, it was verified by the SHO of the police station by putting his seal as 'PS'. It is further stated that on 06.04.2012, ASI Gurdarshan Singh took both the accused persons along with sample parcels from the Malkhana of the police station and produced them before the Illaqua Magistrate, who verified the same and on the direction, he deposited the sample parcels with Head Munshi of the Malkhana. Thereafter, on 05.06.2012, as per order of the Illaqua Magistrate, both the sample parcels and intoxicant powder 10/10 grams and residue parcels of intoxicant powder of 480/480 grams were deposited in the Judicial Malkhana attached to the Court of Chief Judicial Magistrate, Patiala. Thereafter, one of the sample parcels, on the same date, was sent through HC Jagdev Singh for depositing with the Chemical Examiner, Kharar. It is further stated in the application that in the disclosure of the accused, recorded on 03.06.2012 and 05.06.2012, it was stated that by mixing the powder of **Parvon & Lemotil**, intoxicant powder was converted into tablets by making small packets.

4. It is worth noticing that on 30.07.2012, the report dated 18.07.2012 was received from the Chemical Examiner, Kharar, in which sample was reported to be containing **“Paracetamol”**.

5. The prosecution filed an application dated 11.01.2013 with a prayer that since the report sent by Chemical Examiner, Kharar, appears to be suspicious, therefore, the trial Court may refer the second sample for

analysis. The petitioner/accused contested this application before the trial Court and the trial Court allowed the application by passing the following order:

“After hearing the learned Addl. PP for the State as well as learned defence counsel and to get the answer to the question that whether the second sample can be sent for re-analysis on the request of investigating agency, I relied upon **2013 (4) RCR (Criminal) 524** in which in para no. 22 Hon'ble Punjab & Haryana High Court observed that:

“[22] Even though the Narcotic Drugs And Psychotropic Substances Act does not have any provision pertaining to the second test of the sample, at the instance of the prosecution, there may arise an occasion which would warrant recourse to second test. It may be a case where the sample contraband sent for examination was lost in transit or could not be traced before ever the test was embarked upon by the Laboratory. The sample would have been subjected to damage during transit or at the Laboratory. There may be a case where the seal found affixed on the sample does not match with the sample seal sent along therewith for comparison by the Chemical Examiner before ever opening the sample for test. Though the Narcotic Drugs and Psychotropic Substances Act does not recognize the right of the prosecution to go in for second test, the aforesaid contingencies warrant second test in the interest of justice. Negation of the plea for second test even in such contingencies would definitely lead to miscarriage of the justice. But

at the same time the prosecution cannot simply come with an application for re-test of the sample already collected or drawn afresh from the bulk quantity just because it was not satisfied with the report submitted at the first instance by the Chemical Examiner. In case the sample itself was tampered with at the instance of the accused or at the instance of the Chemical Examiner, of course, the prosecution can pray for fresh test by another Laboratory of the sample already kept or the sample draw from the bulk of the quantity. Under such circumstances two sets of opinion, may emerge in a particular case. Under the PFA Act and the Insecticides Act, the ultimate report submitted by the analyst has been termed as conclusive proof. But in the Narcotic Drugs and Psychotropic Substances Act there is no such provision to term the report ultimately submitted by the Central Forensic Science Laboratory as conclusive proof making in roads into the domain of the Evidence Act. When the Special Act governing the Narcotic offences does not speak about the relative probative value of the first result and final result of the sample, the general law of evidence will have to be applied.”

So, as discussed above it came out that there is no provision for sending a second sample for chemical analysis on the request of investigating agency, however in the interest of justice the second sample can be sent for Chemical Analysis on the request of investigating Agency when, already sent sample is lost, damaged, when seal does not match with the sample seal, if the

sample is tampered at the instance of accused and there is strong material to dislodge the report submitted by the competent chemical examiner and in the case in hand investigating agency filed this application for sending the second Sample on the ground that there was a connivance between the accused and the Chemical Examiner. The case was also registered against the Chemical Examiner for giving false report.

To my mind to obtain expert's opinion would not amount to, filling up the gap in the prosecution case. The alleged offence is a very serious offence not against the State but against the human race capable of killing not one or two individuals but in mass. The seized contraband would have been successfully distributed amongst the consumers. Therefore, with a view to achieve satisfactory public purpose, it is undoubtedly the duty of the Court to secure the ends of justice by legal means.

So, as discussed above, in the interest of justice, application for sending second sample is hereby allowed. Investigating Officer is directed to send the second sample after following proper procedure. Copy of order be sent to the Investigating Officer for compliance.”

6. Thereafter, co-accused Jaswinder Singh @ Phinder filed a petition bearing **CRM-M-43625-2014** before this Court and while issuing notice of motion on 22.12.2014, this Court passed the following order:

“Learned counsel for the petitioner contends that in this case in the first sample, the report was received that it is paracetamol powder. Now the second sample has been sent by the Court on the ground of connivance of the accused with the Chemical Examiner. It is stated that there is no FIR against any official of the Chemical Examiner regarding the present case. Learned counsel

has also relied upon guidelines laid down by the Division Bench of this Court in ***Amarjit Singh v. State of Punjab, 2013 (4) RCR (Criminal) 524*** and has stated that the second sample could not be sent as has been done in the present case. It is further stated that the second sample is being sent to the same laboratory i.e. Chemical Laboratory, Kharar.

Notice of motion for 17.2.2015.

Operation of the impugned order is stayed.”

7. Thereafter, on 18.02.2015 while hearing the aforesaid petition along with another petition bearing ***CRM-M-2667-2014*** filed by the petitioner, the said order was modified by passing the following order:

“Reply filed in CRM-M No.43265 of 2014 by way of affidavit of Sewa Singh, PPS, Deputy Superintendent of Police, Nabha, on behalf of the State, in the Court today, is taken on record.

Adjourned to 19.03.2015.

In this case, it was alleged that the second sample is being sent to the same Chemical Laboratory, Kharar, therefore, the operation of the impugned order was stayed.

Learned State counsel, on instruction from ASI Lakhbir Singh, informs the Court that the second sample is being sent to CFL, Chandigarh. Thus, the stay will be operative only when the second sample is being sent to the same Chemical Laboratory, Kharar. If, it is being sent to CFL, Chandigarh, the stay will not be operative.”

8. Learned counsel for the petitioner further submitted that in the meantime, the report dated 30.01.2015 qua second parcel was received from CFL, Chandigarh and as per the result of examination, the parcel was found to be containing ***Ibuprofen, Acetaminophen, Caffeine, Dicyclomine,***

Dextropropoxyphene and ***Nimesulide***, vide Annexure P-6.

9. Learned counsel further submitted that on the basis of the aforesaid report, now the impugned order has been passed by the trial Court framing charge against the petitioner under Section 22 of the NDPS Act. It is further submitted that thereafter, the petitioner had withdrawn the aforesaid petition with liberty to challenge the impugned order framing charge.

10. Reply, by way of affidavit of DSP, Circle Nabha, District Patiala, filed on behalf of the respondent-State, is on record, wherein it is stated that when both the accused persons were produced before the Illaqua Magistrate on 04.06.2012, it was ordered that case property be deposited with Incharge, Malkhana of CJM, Patiala, however, since the copy of order could not be received on 04.06.2012, it was not deposited with the MHC, Malkhana on that day and in fact on the next day i.e. 05.06.2012, the same was deposited with Incharge, Malkhana of CJM, Patiala, against receipt dated 05.06.2012. It is admitted in the reply/affidavit that as per Chemical Examiner, Kharar, the sample was found to be containing '***Paracetamol***'. It is further stated that in some other FIRs, when the samples were sent to Chemical Examiner, Kharar, less quantity of intoxicant were shown, which raised suspicion and the Vigilance Department, Punjab conducted an inquiry, on the basis of which, FIR No. 14 dated 11.11.2013, under Sections 420, 467, 468, 471, 218, 201, 120-B of the IPC and Sections 7, 13(1)(d) read with Section 13(2) of the Prevention of Corruption Act, 1988 was registered against Dr. Rajwinder Pal Singh, Assistant Chemical Examiner, FSL, Kharar, Punjab. It is further stated that in view of the said fact, the application was moved before the trial Court for analysis of the second

sample by CFL, Chandigarh and the same was allowed and as per the report of CFL, Chandigarh, the sample was found containing narcotic substances.

11. Learned counsel has further argued that there is no provision in the NDPS Act for sending a second sample for analysis. Learned counsel has relied upon **2013 (1) RCR (Criminal) 861, Thana Singh vs. Central Bureau of Narcotics**, wherein Hon'ble Supreme Court in para 25 has observed 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.”

12. Learned counsel for the petitioner has further relied upon **2014(4) Crimes 457, Laxmi Nagappa Koli vs. Narcotic Control Bureau and another**, wherein, while relying upon **Thana Singh's** case (supra), Hon'ble Supreme Court has held that the Special Judge, only in extreme and exceptional circumstance, can direct for examination of second sample and the first report of the FSL cannot be ignored.

13. Learned counsel for the petitioner has further relied upon

2013 (4) RCR (Criminal) 524, Amarjit Singh vs. State of Punjab, wherein a Division Bench of this Court has held as under:

“22. Even though the Narcotic Drugs And Psychotropic Substances Act does not have any provision pertaining to the second test of the sample, at the instance of the prosecution, there may arise an occasion which would warrant recourse to second test. It may be a case where the sample contraband sent for examination was lost in transit or could not be traced before ever the test was embarked upon by the Laboratory. The sample would have been subjected to damage during transit or at the Laboratory. There may be a case where the seal found affixed on the sample does not match with the sample seal sent along therewith for comparison by the Chemical Examiner before ever opening the sample for test. Though the Narcotic Drugs and Psychotropic Substances Act does not recognize the right of the prosecution to go in for second test, the aforesaid contingencies warrant second test in the interest of justice. Negation of the plea for second test even in such contingencies would definitely lead to miscarriage of the justice. But at the same time the prosecution cannot simply come with an application for re-test of the sample already collected or drawn afresh from the bulk quantity just because it was not satisfied with the report submitted at the first instance by the Chemical Examiner. In case the sample itself was tampered with at the instance of the accused or at the instance of the Chemical Examiner, of course, the prosecution can pray for fresh test by another Laboratory of the sample already kept or the sample draw from the bulk of the quantity. Under such circumstances two sets of opinion, may emerge in a particular case. Under the PFA Act and the Insecticides Act, the ultimate report submitted by the analyst has

been termed as conclusive proof. But in the Narcotic Drugs and Psychotropic Substances Act there is no such provision to term the report ultimately submitted by the Central Forensic Science Laboratory as conclusive proof making in roads into the domain of the Evidence Act. When the Special Act governing the Narcotic offences does not speak about the relative probative value of the first result and final result of the sample, the general law of evidence will have to be applied.

23. In the instant case it is the admitted position that the first sample was properly drawn, sealed and sent for examination. A vague allegation has been made in the application submitted by PW2 that such a negative report had come into existence on account of the connivance of the accused with the Chemical Examiner. Though the prosecution has every right to go in for second test, based on such prima facie allegation, in the absence of any specific provision to give priority only to the report submitted by the Central Forensic Science Laboratory, the prosecution is bound to completely demolish the first report which was submitted to their inconvenience before ever persuading the court to accept the second report submitted by the Central Forensic Science laboratory.”

14. Learned counsel has referred to aforesaid FIR No. 14, which was registered against the Assistant Chemical Examiner, Kharar, from where the first report was obtained with the result '*Paracetamol*' to submit that in the entire FIR, there are instances of various other FIRs registered under the NDPS Act showing less quantity of narcotics, however, in this FIR No. 14, there is no reference of the present FIR, in which the petitioner is facing trial and, therefore, the application, filed by the prosecution seeking analysis of second sample, is based on incorrect facts.

15. Learned counsel further submitted that a perusal of the application would further show that no exceptional circumstance, in view of judgment in *Thana Singh* and *Laxmi Nagappa Koli's* cases (supra), is made out as there is only a passing reference that FIR No. 14 is registered against the Assistant Chemical Examiner, Kharar, whereas there is no reference to the present FIR, in which the petitioner is facing trial.

16. Learned counsel has, thus, argued that the trial Court has allowed the application without forming an opinion whether any exceptional circumstance is made out which would include the circumstance i.e. if the sample parcel is lost in transit or could not be traced or is damaged or the seal is found damaged or does not match with the sample seal sent along with the same for comparison by the Chemical Examiner.

17. Learned counsel has next argued that that the samples were sealed on 03.06.2012 and thereafter, for two days the same were kept with MHC, Malkhana and only on 05.06.2012, the same were handed over to Judicial Malkhana of CJM, Patiala. It is further submitted that after the first report was received on 18.07.2012, an application dated 11.01.2013 was moved after a gap of about six and a half months without explaining the delay and the application was allowed, vide order dated 17.11.2014, again after a gap of about one and a half years and only thereafter the second sample was sent to CFL, Chandigarh after a delay of more than two years. Therefore, in the intervening period, it cannot be said that the samples were kept intact in the safe custody and the prosecution has not explained the delay in moving the application when the first report was received on 18.07.2012.

18. Learned counsel has further argued that on 23.02.2016,

noticing the fact that provisions of Section 52-A of the NDPS Act have not been complied with as the Illaqua Magistrate has not drawn the representative of sample, the Illaqua Magistrate for the first time on 16.08.2016, on the direction of Special Judge, has drawn sample from the residue parcels and has issued a certificate under Section 52-A of the NDPS Act. The operative part of the order dated 16.08.2016 and the said certificate of the even date read as under:

“Present application has been moved by SHO, P.S. Nabha seeking permission to destroy the case property. As per office order of learned Chief Judicial Magistrate, Patiala the undersigned was entrusted the cases of P.S. Sadar Nabha with regard to compliance of Section 52-A of NDPS Act in cases pending trial.

In the present case vide order dated 23.2.2016, learned Judge, Special Court, Patiala Sh. Sandeep S. Jossan, has directed that the provisions of Section 52-A of NDPS Act shall be duly complied with before passing any order with regard to giving permission to destroy the case property. For such purpose, the undersigned went to Judicial Malkhana and directed the Incharge, Judicial Malkhana to take out the case property. On production of case property before the undersigned, the due compliance of Section 52-A of NDPS Act has been made and the required certificate under such Section is separately prepared and the remaining bulk case property as well as the one representative sample taken out were duly sealed with the seal of undersigned as "AD" and the photographs was taken and duly attested and fixed on the certificate itself. Since the provisions of Section 52-A of NDPS Act has been duly complied with, now the matter may be put up before the Drug Disposal Committee to get the custody of case property except representative

sample from Judicial Malkhana for its disposal as per rules, notification issued by Government of India on 16.1.2015 and in view of observations of Hon'ble Supreme Court of India in latest judgment titled as ***Union of India Vs. Mohan Lal and another***, Criminal appeal No.652 of 2012 decided on 28.1.2016. Papers be consigned to record room and intimation be sent to the court of Sh. Sandeep S.Jossan, learned Judge, Special Court Patiala.”

Certificate under Section 52-A of Narcotic Psychotropic Substances Act, 1985.

1. The case property pertaining to this case i.e. two bags purporting to contain 480/480 gm intoxicant powder duly sealed with the seal GS/PS has been produced today before me being Duty Magistrate. The seal affixed on the case property was found intact.

2. It is certified that I have got taken four representative sample 10 gm intoxicant power from the entire case property in my presence and have got the remaining case property of 460/460 gm intoxicant powder and representative samples sealed with my seal bearing impression 'AD' of and specimen of my seal is affixed below:

3. The photograph of the case property including the samples was got taken from photographer. The photograph affixed below is the correct and true photograph of the case property pertaining to this case.”

19. Learned counsel for the petitioner has submitted that though the representative sample taken before the Judicial Magistrate bears the seal of 'AD' but the same was not sent to FSL because first report dated 18.07.2012 and second report dated 30.01.2015 show that in both cases, the sample parcels were bearing the seal of Investigating Officer as 'GS' and that of

SHO as 'PS' and, therefore, the sample which was drawn before the Magistrate was not sent to Chemical Examiner. It is further submitted that even as per order dated 16.08.2016, passed by the Illaqua Magistrate and the certificate issued under Section 52-A of the NDPS Act, it is evident that the representative sample drawn by the Magistrate after about three and a half years of the registration of the FIR was sealed with seal 'AD' and admittedly, this sample was never sent to Chemical Examiner.

20. Learned counsel has, thus, argued that prosecution of the petitioner stands vitiated and the impugned order, framing charge against the petitioner under Section 22 of the NDPS Act, is liable to be set aside.

21. Learned State counsel, on the basis of the aforesaid affidavit of DSP, Circle Nabha, District Patiala, has not disputed the factual position as well as the dates as stated by learned counsel for the petitioner. The only explanation, given in the said affidavit, is that when FIR No. 14 was registered on 11.11.2013, it came to the notice that officials of Chemical Examiner, Kharar are not acting as per law and after facing the trial, Dr. Rajwinder Pal Singh, Assistant Chemical Examiner, FSL, Kharar, Punjab has already been convicted. However, learned State counsel could not dispute that in FIR No. 14, there is no reference to the present FIR, in which the petitioner and co-accused Jaswinder Singh @ Bhinder are facing trial.

22. Learned State counsel has further submitted that since an official of Chemical Examiner, Kharar was found involved in corrupt practices and even FIR No. 14 was registered against Dr. Rajwinder Pal Singh, Assistant Chemical Examiner, who stands convicted, it was an exceptional circumstance, therefore, the second sample was rightly sent for

analysis.

23. After hearing learned counsel for the parties, I find merit in the present petition, for the following reasons:

(a) As per the prosecution case, on 03.06.2012, two sample parcels of 10 grams each and two residue parcels of 480 grams each were sealed with seal 'GS' of Investigating Officer and 'PS' of SHO. It is further the case of prosecution that sample parcels were kept in Malkhana of the police station and when the same were produced before the Illaqua Magistrate, no seal or signature of the Illaqua Magistrate was taken on both the sample parcels, therefore, there were only identification seals of Investigating Officer as 'GS' and that of SHO as 'PS' and admittedly, for two days, both the sample parcels were in the custody of the police itself. On the next day i.e. 04.06.2012, the sample parcels were produced before the Illaqua Magistrate who directed that the samples be kept in Judicial Malkhana, however, the same were transferred only on 05.06.2012 and for two days, the same were kept with MHC of the police station. There is no explanation as to why the order of Illaqua Magistrate was not complied with on the same date i.e. 04.06.2012.

(b) It is own case of the prosecution that both sample parcels were not checked by Illaqua Magistrate as both neither bear his signature nor seal on these parcels. This

fact is further corroborated from order dated 16.08.2016, vide which Illaqua Magistrate, after three years, drawn representative sample parcel in compliance of an order of Special Judge directing him to comply with provision of Section 52-A of the NDPS Act. The sample drawn by the Magistrate from residue parcel bears his seal as 'AD' and this sample was never sent for re-analysis. Moreover, this exercise is done by the prosecution just to fill up lacuna at a highly belated stage.

(c) The first report was received on 18.07.2012 showing the contents as '*Paracetamol*' and thereafter, the application was moved by the prosecution on 11.01.2013 for analysis of second sample, however, there is no reference in this application regarding any exceptional circumstance except that the report of Chemical Examiner, Kharar seems to be suspicious.

(d) The case set up by the prosecution in the affidavit of DSP, Circle Nabha, District Patiala, dated 14.08.2019, is clearly an afterthought. The application was moved before the trial Court on 11.01.2013, whereas the FIR No. 14 against the official of Chemical Examiner, Kharar was registered on 11.11.2013 and, therefore, the prosecution has tried to justify the order of the trial Court allowing the application on the basis of the FIR, which was not in existence when the application was moved before the trial Court,

(e) There is nothing on record to show that from 05.06.2012 till the time the trial Court allowed the application for analysis of second sample on 17.11.2014, the sample parcels were kept in safe custody. Therefore, admittedly, the '**second**' sample was sent for analysis after about two and a half years, hence, the possibility of tampering with same cannot be ruled out as it bears only the seal of Investigating Officer and SHO and there is no signature of the Illaqua Magistrate before whom the samples were produced for verification.

(f) In view of the aforesaid facts, it is apparent that no exceptional or extraordinary circumstance is made out to send the second sample for analysis as on 04.06.2012 when the accused were produced along with the sample parcels and the case property before the Illaqua Magistrate, provisions of Section 52-A NDPS Act were never complied with as neither any representative sample was drawn by the Magistrate nor the samples drawn by the Investigating Officer and verified by the SHO were ever verified by the Illaqua Magistrate by putting his own seal so as to say that both the samples were verified by him. Mere fact that on direction of Special Judge, after the lapse of more than three and a half years, the Illaqua Magistrate complied with the provisions of Section 52-A of the NDPS Act, is just an eye-wash as before this date, both the reports of the Chemical

Examiners were received and both the samples were never verified by the Judicial Magistrate in terms of Section 52-A by putting his seal.

24. Therefore, keeping in view the above facts and circumstance and also in view of the judgments rendered by Hon'ble Supreme Court in ***Thana Singh*** and ***Laxmi Nagappa Koli's*** cases (supra), the present revision petition is allowed and the impugned order dated 26.11.2018, vide which the trial Court has framed charge against the petitioner under Section 22 of the NDPS Act, is hereby set aside.

25. The petitioner stands discharged accordingly.

04.03.2020

Waseem Ansari

(ARVIND SINGH SANGWAN)
JUDGE

Whether speaking/reasoned

Yes

Whether reportable

Yes