

IN THE HIGH COURT OF PUNJAB & HARYANA AT CHANDIGARH

CRM-M-33037 of 2020 (O&M)

Date of decision : 27.01.2021

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Badar Ram

.....Petitioner

vs.

State of Haryana

.....Respondents

Coram: Hon'ble Mr. Justice H. S. Madaan

Present: Mr. Aditya Sanghi, Advocate
for the petitioner.

Mr.Karan Garg, Assistant Advocate General,
Haryana

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H. S. Madaan, J. (Oral)

Case taken up through video conferencing.

Petitioner- Badar Ram son of Pema Ram, aged about 25 years, resident of Devasio Ka Bad, Akadawas, Police Station Randi, District Pali, Rajasthan, an accused in FIR No. 39 dated 20.1.2020, for offences under Sections 21/27-A of NDPS Act, registered at Police Station City Rewari, District Rewari, has brought the present petition under Section 482 Cr.P.C. seeking quashing of impugned order dated 24.9.2020, passed by Sessions Judge, Rewari, vide which such Court has accepted the application of the prosecution to

draw second sample from the recovered case property.

Briefly stated, the prosecution story is that on 20.1.2020, accused Badar Ram was apprehended by the Police Party and he was found to be carrying a bag having contraband in the form of 734 gms of Brown Sugar (Heroine). He was accordingly arrested. The recovered contraband was taken into possession after drawing requisite samples. Formal FIR in the matter was recorded. The investigation in the case started. Two samples drawn from the recovered contraband were sent to RFSL, Bhondsi simultaneously and as per report dated 7.2.2020 received from RFSL Bhondsi, no common narcotic drug could be detected in the samples. The State was not satisfied with the report and moved an application before the trial Court seeking permission to draw another sample from the remaining case property, which on being produced before him, had been sealed by Chief Judicial Magistrate, Rewari and got deposited in Judicial Malkhana. The State wanted to send the sample so drawn from the case property, to FSL, Madhuban, for fresh analysis. The accused opposed the application vehemently. After hearing the arguments, learned Sessions Judge, vide impugned order dated 24.9.2020, accepted the application observing that two samples drawn from the recovered contraband had been sent to RFSL, Bhondsi inadvertently, for which the police official at fault is facing departmental action and since the contraband recovered in this case amounts to commercial quantity, for just and fair trial and in the interest of justice the application deserves to be accepted and it was allowed accordingly, leaving the accused aggrieved, who has

approached this Court by way of filing the present petition.

Notice of the petition was given to the State, which has put in appearance through State counsel.

I have heard learned counsel for the petitioner learned State counsel, besides going through the record.

Learned counsel for the petitioner has pressed into service the judgment of the Apex Court **Thana Singh vs. Central Bureau of Narcotics 2013 (1) RCR (Criminal) 861**, the relevant paras of which are paras No. 23 and 25, which are reproduced for ready reference :-

“E. Re-testing Provisions

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.

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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](#).”

He has also placed reliance on a Division Bench judgment of this Court reported as *Amarjit Singh vs. State of Punjab 2013 (4) RCR (Criminal) 524*, wherein while dealing with the question whether in a case under the Narcotic Drugs and Psychotropic Substances Act, 1985, a sample can be sent for chemical analysis on the basis of the request made by the investigating agency, it was observed as under :-

- (i) There is no provision in Narcotic Drugs and Psychotropic Substances Act to send second sample for chemical analysis by Chemical Examiner – However, in the interest of justice, the prosecution may be allowed second test in certain circumstances, i.e.
- (ii) Where the same contraband sent for examination was lost in transit or could not be traced before ever the test was embarked upon the Laboratory.
- (iii) The sample would have been subjected to damage

during transit or at the Laboratory.

(iv) 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.

(v) However, 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.

(vi) In case the same 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 already drawn from the bulk of the quantity.

(vii) Unless there is a strong material to dislodge the report submitted by the competent Chemical Examiner the second report submitted by the Central Forensic Science Laboratory Hyderabad cannot at all be accepted by the Court. 1995(2) RCR (Criminal) 311, Distinguished.”

Learned counsel for the petitioner has contended that the present eventuality has been clearly dealt with in the Division Bench judgment, categorically observing that 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.

Learned State counsel could not distinguish those authorities on any point or refer to any other judgment by the Apex Court or by this Court, where a contrary view in the matter might have been taken. Though he had submitted that if a fresh sample is drawn from the recovered contraband, which is duly sealed and stored, no prejudice is going to be caused to the accused.

After hearing the rival contentions and going through the judgments referred to by the learned counsel for the petitioner, I find that the impugned order cannot be sustained and is bound to be set aside, since the case in hand is squarely covered by the judgments referred to by the learned counsel for the petitioner and in **Amarjit Singh's case (Supra)**, this eventuality has been dealt with holding that re-drawing of sample cannot be got done by the prosecution simply because it is not satisfied by the report received with regard to the first sample sent to the FSL.

Under the circumstances, the petition calls for acceptance, the same is allowed and the impugned order dated 24.9.2020, passed by Sessions Judge, Rewari, is set aside.

27.01.2021
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(H.S. Madaan)
Judge

Whether speaking / reasoned Yes / No

Whether reportable Yes / No