

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CRIMINAL APPELLATE JURISDICTION**

CRIMINAL APPLICATION NO. 1142 OF 2023

Michael Onyeka Jude	..Applicant
Versus	
Directorate of Revenue Intelligence & Anr.	..Respondents

Mr. Ayaz Khan for Applicant.
Mr. Amit Munde, Spl. P. P. a/w. Jai Vohra for Respondent No.1.
Mr. Arfan Sait, APP for State/Respondent No.2.

**CORAM : SARANG V. KOTWAL, J.
DATE : 27 OCTOBER 2023**

P. C. :

1. The Applicant has challenged the order dated 10.07.2023 passed by the learned Special Judge for N.D.P.S. at Mumbai. By the impugned order, the learned Special Judge allowed the application filed by the Respondent No.1 herein i.e. the Directorate of Revenue Intelligence, praying for sending the reserved sample for testing to CRCL, New Delhi. However, the learned Special Judge vide his order permitted the reserved sample to be sent to the Central Forensic Science Lab (CFSL) for testing.

2. Heard Mr. Ayaz Khan, learned counsel for the Applicant, Mr. Amit Munde, learned Special P. P. for the Respondent No.1 and Mr. Arfan Sait, learned APP for the State/Respondent No.2.

3. Before referring to the submissions made by both the sides, it is necessary to mention some facts on record.

i) On the basis of specific intelligence, a passenger by the name Maheswaran Rajgopal Thondapa who had arrived in Mumbai through a flight from a foreign country on 19.03.2023 was intercepted. His luggage was searched. It resulted in recovery of 9.97kg of material in powder and lump form. It was tested by the field testing kit and the result showed positive for Heroin. It was valued at around Rs.70 crores. It was seized under the panchanama dated 19.03.2023. His statement was recorded U/s.67 of The Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as 'N.D.P.S. Act'). It led the investigating agency to the present applicant who was residing at a hotel in Mumbai.

ii) The investigating agency went to that hotel and further investigation was carried out. The applicant led the investigating agency to a rented house. The search resulted in seizure of 98 gms. of white powder purported to be Cocaine and 100gms. of light yellow powder purported to be heroin. It was seized. The investigation was carried out for commission of offences punishable under sections 21(c), 23(c), 28, 29 and 30 r/w. Section 8(c), as well as, U/s.25 and 27A of the N.D.P.S. Act. The applicant and the co-accused were arrested.

iii) On 19.04.2023, the procedure U/s.52A of the N.D.P.S. Act was carried out and two samples each of the three separate articles were drawn. They were marked as 'A1 original' and 'A1 duplicate', 'B1 original' and 'B1 duplicate', as well as, 'C1 original' and 'C1 duplicate'. The samples were drawn before the Additional Chief Metropolitan Magistrate, Esplanade, Mumbai.

iv) On 20.04.2023, the samples marked as 'A1

original', 'B1 original' and 'C1 original' were sent to the Deputy Chief Chemist (DYCC), New Custom House Laboratory, Mumbai for chemical analysis.

v) The test reports dated 30.06.2023 from DYCC, Mumbai in respect of those samples were received on 06.07.2023 by the investigating agency.

vi) The report in respect of 'A1-Original' reads thus - 'Received one sample packet marked as "A1-Original". The sample is in the form of brownish sticky pasty mass. On the basis of Chemical, Chromatographic and Spectrometric examination the sample does not show the presence of Heroin (Diacetyl morphine), Morphine cocaine, Amphetamine & Methamphetamine. **However, for further identification/confirmation the sample may be forwarded to any other government laboratory, if required.** (The bold portion is reproduced as it was mentioned in bold letters in that report).

vii) The report in respect of 'C1-Original' reads thus -

‘Received one sample packet marked as “C1-Original”. The sample is in the form of off white powder. On the basis of Chemical, Chromatographic and Spectrometric examination the sample does not show the presence of Heroin (Diacetyl morphine), Morphine cocaine, Amphetamine & Methamphetamine. However, **for further identification/confirmation the sample may be forwarded to any other government laboratory, if required.** (The bold portion is reproduced as it was mentioned in bold letters in that report).

viii) The report in respect of ‘B1-Original’ reads thus -
‘Received one sample packet marked as “B1-Original”. The sample is in the form of white lumps and powder. On the basis of Chemical, Chromatographic and Spectrometric examination the sample under reference answers a positive test for the presence of Cocaine in the sample.

4. After receipt of this report, the application in question

was preferred by the Respondent No.1 herein before the learned Special Judge, vide M.A.No.1027 of 2023 in R.A.No.380 of 2023. After mentioning the basic facts of seizure and also referring to the report of the DYCC lab dated 30.06.2023, following averments were made in paragraph-7 and 8 as follows:

Paragraph-7 reads thus:

“Further, it is not clearly mentioned in the lab test reports that the reports are negative for all NDPS substances with respect to samples A-1 and C-1 and the experts of the lab have opined in the report itself that for further identification/confirmation, the sample may be forwarded to any other Government laboratory, if required.”

Importantly, paragraph-8 reads thus:

“In view of the aforementioned submissions, the department needs to get the second samples marked as A1-Duplicate and C1-Duplicate drawn before the Ld. Metropolitan Magistrate on 19.04.2023, and presently lying in the godown at New Custom House, analyzed chemically at CRCL, New Delhi. It is humbly submitted that permission may please be granted to forward the duplicate

samples marked as A1-Duplicate and C1-Duplicate which were drawn during the course of 52-A proceedings in the presence of the Hon'ble CMM, Esplanade, Mumbai for testing to CRCL, New Delhi in light of the Hon'ble Supreme Court judgment in the case of Thana Singh Vs. Central Bureau of Narcotics (Criminal Appeal No.1640 of 2010) and order passed in Union of India Vs Govind (Criminal Revision No.2360 of 2022).

Finally, prayer was made as follows:

“Permission may please be granted to forward the duplicate samples marked as A1-Duplicate and C1-Duplicate which were drawn during the course of 52-A proceedings in the presence of the Hon'ble CMM, Esplanade, Mumbai for testing to CRCL, New Delhi.”

This application was made on 10.07.2023. On this application, the learned Special Judge passed the following order on the same day i.e. on 10.07.2023.

“Heard. Perused the report of DYCC. The reserved sample is permitted to be sent to Central Forensic Lab for testing.”

This particular order is under challenge in the present

application. To complete the chronology of events, it needs to be mentioned that the samples i.e. A1-Duplicate and C1-Duplicate were sent to the Central Forensic Science Laboratory (CFSL), at Pune and the report mentions thus:

“The exhibits were analyzed by chemical tests and Gas Chromatography-Mass Spectrometry. Based on the above methods the results given as:

1. Diacetylmorphine has been detected in Exhibit Ex-A1-Duplicate.

2. Ex-C1-Duplicate is a sample of cutting agent comprising Phenacetin, Lidocaine and caffeine commonly misused in cocaine trafficking.”

This report is dated 08.08.2023. The said report was received by the investigating agency on 17.08.2023. The complaint was filed after completion of the investigation on 13.09.2023. On 18.09.2023, the learned Special Judge took cognizance of the case. The present application challenging the impugned order was filed on 02.09.2023.

5. Mr. Ayaz Khan, learned counsel appearing for the applicant made following submissions:

i) He referred to the guidelines issued by the Hon'ble Supreme Court in the case of ***Thana Singh Versus Central Bureau of Narcotics***¹. He submitted that, those guidelines are mandatory and paragraph-25 of the said Judgment mandates that, results of the tests conducted by the concerned laboratory must be furnished to all the parties concerned with the matter. He submitted that, in the present case, the report dated 30.06.2023 was never furnished to the applicant. The applicant is in custody and thus, he was available for service of a copy of that report. The investigating agency has not doubted the genuineness of the test carried out by the DYCC and, therefore, the application for further analysis by a different laboratory was not at all necessary. There were no compelling and exceptional circumstances for sending the other samples to CFSL at Pune. When the application for sending the other samples to CFSL was preferred, neither a copy of the application was served on the applicant, nor the applicant was heard when the application was decided. This has caused serious

1 Criminal Appeal No.1640 of 2010 decided on 23.01.2013.

prejudice to the accused/applicant. The impugned order is cryptic. No cogent or compelling reasons for sending the other samples to the CFSL are mentioned. The order was passed on the same date. No opportunity was given to the applicant. His say was not even called.

ii) Mr. Khan then referred to another Judgment of the Hon'ble Supreme Court in the case of ***Laxmi Nagappa Koli Versus Narcotic Control Bureau and another***². In that case, the Hon'ble Supreme Court had set aside the orders passed by the Special Judge and by the High Court for sending the samples to another laboratory for testing. Mr. Khan submitted that, in the present case also there was no necessity to send the samples to the CFSL.

iii) Mr. Khan further relied on another order of the Hon'ble Supreme Court in the case of ***Karu Lal Versus State of Punjab***³. In that case, the Hon'ble Supreme Court had held that the State had failed to show any ground to doubt the earlier chemical test of the contraband and no ground was

² 2015 (13) SCC 598

³ Special Leave to Appeal (Cri) No.7646 of 2013; decided on 16.12.2013.

given for retesting and re-sampling. Therefore, it was observed by the Hon'ble Supreme Court in that case that the second report which was ordered to be provided without any valid ground, cannot be relied on.

iv) Mr. Khan further relied on the order dated 22.06.2017 passed by a Single Judge bench of this Court in ***Criminal Writ Petition No.697 of 2016***; in which, a request made by the State for sending the sample for retesting to CFL at Hyderabad was rejected. It was observed that, there was nothing on record to establish that the test carried out by the Regional Forensic Science Laboratory was not according to the scientific norms. Merely because Central Forensic Laboratory at Hyderabad was equipped with advanced facilities for carrying out the test, that by itself can not be the ground for allowing retesting of samples. Mr. Khan submitted that, the DYCC was also a recognized laboratory and, therefore, there was no reason to send the other samples to CFSL, Pune.

6. Mr. Munde, learned Special P. P. opposed these submissions. His contentions are as follows:

i) The case involves commercial quantity of narcotic drug and, therefore, the investigating agency had 180 days to complete the investigation from 19.03.2023. During that statutory period, the investigating agency had all the powers to conduct the investigation to collect the evidence. Therefore, when the application was made on 10.07.2023 for sending the other samples to CRCL at New Delhi, the investigating agency was well within its rights to conduct further investigation. The investigating agency had complied with the period mentioned in *Thana Singh's case (supra)* and after receipt of the first report dated 30.06.2023 on 06.07.2023, immediately within four days i.e. on 10.07.2023 the application for sending the other samples to CRCL, New Delhi was preferred. Thus, the guidelines in *Thana Singh's case (supra)* were followed.

ii) The complaint was filed on 13.09.2023 after

receipt of the report from CFSL, Pune and cognizance was taken on 18.09.2023. Therefore, till filing of the complaint the investigation was going on and at that stage the accused had no right to participate or interfere in the investigation.

iii) The remand report dated 25.07.2023 refers to the application for seeking permission for sending the duplicate samples for testing and the said remand report also refers to the order permitting the same. Therefore, this stage was not concealed from the accused/applicant and till filing of the present application, no grievance was raised by the accused/applicant.

iv) Mr. Munde submitted that the application was made with a specific prayer for sending the samples to CRCL, New Delhi. The learned Special Judge did not accede to that particular request specifically, but permitted the samples to be sent to CFL. The order also mentioned that the learned Special Judge had perused the report of DYCC. This shows that, there was proper application of mind and it was a

conscious decision. Therefore, it cannot be said that the order is a cryptic order without reasoning.

v) Mr. Munde relied on the Judgment of the Calcutta High Court, in the case of *Ashfaque Ahamed Versus State of West Bengal*⁴. He submitted that, the compelling circumstances set out in the application must be treated to be the reasons for passing the order for retesting.

vi) Mr. Munde further submitted that the DYCC report itself mentions that, for further identification/confirmation the sample needed to be forwarded to any other Government laboratory, if required. Therefore, the report of the DYCC was not conclusive and the same report suggests that further confirmation was needed. This is a compelling ground for sending the second set of samples for testing by another laboratory. Mr. Munde submitted that, as of today, the report of the CFSL, Pune is available showing presence of Heroin in the major contraband. This report cannot be ignored and the

4 CRM 954 of 2021; decided on 16.06.2022.

accused/applicant cannot be granted benefit in such a serious case.

7. In re-joinder to these submissions made by Mr. Munde, Mr. Khan submitted that the Judgment in *Ashfaque's case (supra)* was not a binding precedent, as far as, this Court is concerned. He submitted that, *Thana Singh's Judgment (supra)* was misinterpreted in the Judgment of the Calcutta High Court in *Ashfaque's case (supra)*. He further submitted that the DYCC mentioned that the same sample be forwarded to another Government Laboratory. It did not mention that second sample which was available with the investigating agency should be sent to another Government laboratory. Lastly, he submitted that, DYCC was a standard laboratory and the report submitted by that laboratory was admissible U/s.293 of the Cr.P.C.

8. I have considered these submissions in the light of the facts of this case and the judgments relied on by both the sides. Both the learned counsel rightly submitted that, *Thana Singh's Judgment (supra)* issued guidelines which were binding on all the

courts and all the parties. Therefore, it is necessary to refer to certain observations in the said judgment. The said order in ***Thana Singh's case (supra)*** was an outcome of a bail matter in which the accused was in prison for more than 12 years awaiting commencement of his trial for offence under the N.D.P.S. Act. In that context, the Hon'ble Supreme Court considered the plight of all those prisoners and the reasons for delay in conducting those trials. In this background, the Hon'ble Supreme Court issued various guidelines. In paragraph-5, the Hon'ble Supreme Court observed thus:

“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 Narcotic Drugs And Psychotropic Substances Act. We would like to clarify that these directions are restricted only to the proceedings under the Narcotic Drugs And Psychotropic Substances Act.”

9. In paragraph-15, the necessity of narcotics laboratories at national level was highlighted. Paragraph-15 in that context is

important; which reads thus:-

“Narcotics laboratories at the national level identify drugs for abuse and their accompanying substances in suspected samples, determine the purity and the possible origin of illicit drugs, carry out drug-related research, particularly on new sources of drugs liable to abuse, and, when required by the police or courts of law, provide supportive expertise in drug trafficking cases. Their role in the effective implementation of the mandate of the Narcotic Drugs And Psychotropic Substances Act is indispensable which is why every state or region must have proximate access to these laboratories so that samples collected for the purposes of the Act may be sent on a timely basis to them for scrutiny. These samples often form primary and clinching evidence for both the prosecution and the defence, making their evaluation by narcotics laboratories a crucial exercise.”

10. In the same context, in paragraph-16 there was a reference to the CFSL at Pune. At that point of time, the said laboratory was being established. As of today, it is functional. The test report in respect of the samples ‘A1-Duplicate’ and ‘C1-Duplicate’ was received from that laboratory as the samples were sent to that laboratory. Thus, as per *Thana Singh’s judgment (supra)* itself it was highlighted that, existence of CFSL was important and, therefore, the report which is received in the

present case from CFSL, Pune assumes greater importance.

11. ***Thana Singh's Judgment (supra)*** further refers to re-testing provisions in paragraph-23; which reads thus:

23. The Narcotic Drugs And Psychotropic Substances 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 v. Deepak. P. Shah, 2001 CriLJ 2690; Nihal Khan v. The State (Govt. of NCT Delhi), 2007(3) RCR (Criminal) 850 : 2007 CriLJ 2074***] or perhaps to Sections 79 and 80 of the Narcotic Drugs And Psychotropic Substances 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 Narcotic Drugs And Psychotropic Substances 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 Narcotic Drugs And Psychotropic Substances 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.”

12. From this discussion, it is clear that the Hon’ble Supreme Court had referred to the delays in the trials because the applications for re-testing and re-sampling were often received at advanced stages of trials after significant elapse of time. It was observed that, re-testing may be an important right of an accused, but the haphazard manner in which the right is imported from other legislations without its accompanying restrictions was impermissible. It was observed that, under N.D.P.S. Act, re-testing and re-sampling was rampant at every stage of the trial contrary to other legislations which defined a specific time-frame within which the right may be available. These observations indicate that the delay for sending the samples for re-testing was a major concern and, therefore, a time-frame was provided under these guidelines. The observations specifically mentioned that, such applications were made at an advance stage of the trial and, therefore, it was necessary to issue guidelines regarding the time-frame.

13. In the present case, the trial has not even commenced and the application for sending the other samples to CRCL was made during the course of investigation within the statutory period for completing the investigation. In this background, paragraph-25 relied on by Mr. Khan needs to be seen. The said paragraph reads thus:

“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 retesting/re-sampling shall not be entertained under the Narcotic Drugs And Psychotropic Substances 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 Narcotic Drugs And Psychotropic Substances Act.

14. In this case, the application was made by the investigating agency within four days of receipt of the first test report and, therefore, the agency adhered to the time-frame of 15

days mentioned by the Hon'ble Supreme Court. As far as exceptional circumstances are concerned, the stand of the prosecuting agency is that the DYCC report itself mentions the need for sending the samples for testing to another Government Laboratory. Therefore, these two requirements are satisfied by the investigating agency. Mr. Khan emphasized on the observation that the result of the test must be furnished to all the parties concerned with the matter. In this context, the observation in paragraph-23 assumes importance. Thus, the discussion in *Thana Singh's case (supra)* was made with reference to delay in conducting trial and to curb the tendency of making application at belated stage of the trial. In this context, these guidelines were issued that the copies of the report were required to be furnished to all the parties. In the present case, an application was made during course of investigation and at that stage, the accused had no locus to interfere with the right of the investigating agency to investigate the offence.

15. As rightly submitted by learned Special P. P. Mr. Munde, the application was specifically made by the investigating agency

for sending the samples to CRCL, New Delhi. That request was not specifically accepted. Instead, the learned Special Judge permitted the samples to be sent to CFL. His order also mentions that, he had perused the report of the DYCC and that he had heard the learned counsel. This indicates that the learned Special Judge had applied his mind. The DYCC report itself mentions the necessity to forward the sample to any other Government laboratory. The application has also made a reference to the specific reasons as to why the duplicate samples needed to be sent to another laboratory; as is reflected in paragraphs-7 and 8 of the said application referred to herein above. Thus, there was sufficient compliance of the guidelines in *Thana Singh's judgment (supra)*, in this particular case. In this context, a reference can be made to the observations in *Ashfaq's case (supra)*. In paragraph-15 of the said judgment, it was observed that, *Thana Singh's judgment (supra)* does not expressly confer any right of hearing to the accused/adverse party at the time of considering a prayer for retesting. The direction for retesting was for collection of evidence during investigation. The investigation is an inquisitorial process. In the present case, as

mentioned earlier, the application for sending the duplicate samples was made at the stage of investigation. It was also observed in the same Judgment of *Ashfaque's case (supra)*, that the compelling circumstances set out in the application must be treated to be the reasons for passing order for retesting. The order of the learned Special Judge in that case showed that, he had perused the petition and its enclosures. I respectfully agree with the observation made in the said Judgment of *Ashfaque's case (supra)*.

16. As far as, Mr. Khan's reliance on *Laxmi Koli's case (supra)* is concerned, in that case, there were reports of FSL Hyderabad and FSL Mumbai showing that the samples did not contain Heroin. In that background, it was observed that, no fruitful purpose would be served by sending another sample to a third laboratory. The facts in this case are completely different. Here, in the present case, the second report shows presence of Heroin in 'A1-Duplicate' sample.

17. In *Karu Lal's case (supra)*, it was observed that the State

had failed to show any ground to doubt the earlier chemical test of the contraband and no ground to retest the contraband was made out. In the present case, DYCC report itself suggests that, further test needed to be conducted by another Government laboratory. For the same reasons, the reliance placed on the order of Single Judge bench of this Court in Criminal Writ Petition No.697 of 2016 decided on 22.06.2017 will have to be discarded. In that order, it was observed that, there was nothing on record to establish that the test carried out by the Regional FSL was not according to the scientific norms. However, in the present case, the DYCC report suggests about the necessity for further analysis.

18. In conclusion, therefore, it is quite clear that the guidelines of *Thana Singh's case (supra)* were followed by the investigating agency. The second test was conducted during the course of investigation. As of today, the report of CFSL, Pune, showing presence of Heroin in the major contraband i.e. from the sample 'A1-Duplicate', is on record. The said report cannot be ignored at this stage. The accused will have sufficient opportunity to cross-examine the witnesses during trial and to put forth his

submissions in respect of both these reports i.e. report of DYCC and the report of CFSL, Pune. Therefore, I do not see any reason to interfere with the impugned order.

19. Consequently, the application is rejected.

(SARANG V. KOTWAL, J.)