

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

CRM-M-9937-2023

Reserved on: 21.11.2023

Pronounced on: 29.11.2023

LAKHVIR SINGH @ LAKHA

. . . . Petitioner

Vs.

State of Punjab

. . . . Respondent

CORAM: HON'BLE MR JUSTICE DEEPAK GUPTA

Present: - Mr. L.S. Sekhon, Advocate, for the petitioner.

Mr. Randeep Singh Khaira, DAG, Punjab.

DEEPAK GUPTA, J.

By way of this petition filed under Section 439 Cr.PC, petitioner prays for his release on regular bail in case FIR No.86 dated 04.07.2022 registered at Police Station Kot Isse Khan, District Moga under Section 22 of the Narcotic Drugs and Psychotropic Substances Act, 1985 [for short 'the NDPS Act']

2. (i) As per prosecution allegations, on 04.07.2022, a police party headed by ASI Buta Singh was present at Bus Stand Manawan in connection with patrolling and checking of suspected persons, when secret information was received against the petitioner to the effect that he was habitual of selling heroin and intoxicant tablets and on that day, he was present near the rooms constructed in Grain Market Manawan, having in his possession intoxicant tablets and waiting for the customers. ASI Buta Singh sent ruqqa to the Police Station and also writing under Section 42 of the NDPS Act to his senior officers.

(ii) On getting the information, another police party headed by ASI Gurpal Singh reached Bus Stand Manawan and after confirming the information from ASI Buta Singh, ASI Gurpal Singh heading the police party raided the place as informed by the informer. A person was found sitting there, who at the sight of the police party took out the black coloured plastic polythene from right pocket of his pants and threw the same on the ground, out of which some strips came out. The strips were found to contain tablets of ***Etizolam 0.05 MG***. The person disclosed his name as Lakhvir Singh @ Lakha (petitioner). ASI Gurpal Singh after introducing himself, informed the petitioner about his legal right to get searched in the presence of gazetted officer or any Magistrate. However, petitioner replied that as the intoxicating tablets are clearly visible in the plastic polythene, so he had faith upon ASI Gurpal. His consent memo was recorded and then, search of the plastic polythene was conducted. It was found to contain 31 strips of ***Etizolam tablets 0.05 mg***, each containing 10 tablets. Thus, there were 310 tablets in 31 strips. The batch number, date of manufacturing and date of expiry were covered with blue ink. Parcel of the recovered tablet was prepared and sealed by ASI Gurpal.

(iii) Next day, the parcel of the recovered tablets along with the petitioner were produced before the Magistrate, who separated two parcels, each containing one strip, whereas 3rd parcel, containing 29 strips, was sealed separately. One sample containing one strip was sent to FSL for analysis, whereas 2 remaining samples i.e., one containing 1 strip and another containing 29 strips were deposited in centralized *Malkhana*. The report of the FSL confirmed the presence of Etizolam salt in the recovered tablets. On completion of investigation, challan was presented but Public

Prosecutor directed the IO to send remaining two parcels for analysis as batch number, date of manufacturing and expiry on the strip was not visible. Charge against the petitioner has already been framed.

3. Contention raised by ld. counsel for the petitioner is the false implication of the petitioner; that only one strip containing 10 tablets was sent for analysis and so, petitioner can be prosecuted to possess 10 tablets only, the weight of which is less than commercial quantity. For remaining 30 strips, there is no mention as to whether they contained the same salt or these were expired medicines. Ld. counsel contends further that no gazetted officer was called at the time of conducting search and that IO himself conducted the search, which is violation of Section 50 of the Act. Further contention is that retesting is not permissible.

With these submissions, prayer is made for grant of bail.

4. Strongly opposing the bail petition, ld. State counsel submits that after obtaining order from the concerned Court on 06.10.2022, the Investigating Officer had also sent the parcel containing 29 strips to the FSL for necessary analysis and as per the report received, these were also found to contain the salt of Etizolam. Ld. State counsel submits that total 310 tablets of Etizolam were found, the total weight of which is **41.85 gm.** The commercial category qua Etizolam starts from 2.5 gm and thus, the recovered quantity of contraband from the petitioner is much-much higher i.e., more than 16 times the limit from where the commercial category starts. Ld. State counsel further submits that as the recovery was effected from the plastic polythene thrown by the petitioner on the ground and the search of personal body of the petitioner was not involved, so Section 50 of the NDPS Act has no applicability and even otherwise, petitioner himself

had opted to be searched from the IO ASI Gurpal Singh by stating that tablets were visible from the plastic polythene. Ld. State counsel also drawn attention towards the custody certificate to point out that petitioner is also involved in two more cases including one case under the NDPS Act.

With these submissions, prayer is made for rejecting the petition.

5. Replying to the aforesaid contentions, ld. counsel for the petitioner has relied upon a decision rendered by Hon'ble Supreme Court in *Thana Singh Vs. Central Bureau of Narcotics*, 2013(2) SCC 590, so as to contend that re-sampling or re-analysis is not permissible. Ld. counsel further relied upon decisions of this Court rendered in **CRM-M-1083-2013** titled as *Surinder Kumar Vs. State of Punjab*, decided on 18.01.2016; **CRM-M-33037-2020** titled as *Badar Ram Vs. State of Haryana*, decided on 27.01.2021 and a decision of Division Bench of this Court rendered in *Amarjit Singh Vs. State of Punjab*, 2013(4) RCR (Criminal) 524, in all of which, by referring to the case of *Thana Singh (Supra)*, it was held that analysis of second sample is not permissible except in certain exceptional circumstances. It is contended that no exceptional circumstances are present in this case and so, prosecution cannot rely upon FSL report pertaining to parcel containing 29 strips. Ld. counsel also submits that though petitioner is involved in one more case pertaining to NDPS, but that was of small quantity, the trial of which is pending before JMIC. Further contention is raised the petitioner is in custody for the last more than 1 year and 4 months.

With these submissions, prayer is reiterated for grant of regular bail.

6. I have considered submission of both the sides and have appraised the record.

7. In the case of *Thana Singh (Supra)*, Hon'ble Supreme Court deprecated the practice of permitting re-sampling or re-testing, which added to the delays. It was held further that once the necessary test has been completed by the concerned laboratory, any request for re-testing or re-sampling shall not be entertained as a matter of course, though these can be permitted in extremely exceptional circumstances, for cogent reasons to be recorded by the presiding Judge.

8. In the case of *Amarjit Singh (Supra)*, a Division Bench of this Court, while dealing with the question as to whether a sample can be sent for re-testing, culled out certain exceptional circumstances and 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.

9. In the present case, as per the prosecution version, 31 stripes were recovered from the petitioner and that the batch number, date of manufacture and date of expiry on the stripes were covered with blue ink. Initially, one strip containing 10 tablets was sent for analysis and after the Public Prosecutor directed the IO to send remaining samples, so after obtaining order from the Court on 06.10.2022, parcel containing 29 strips was also sent. Result was the same to the effect that salt of Etizolam was found. Thus, this Court finds that *prima facie* it is not a case of re-testing or re-sampling. Rather, it is a case where analysis of the remainder of the recovered contraband was necessitated after noticing that batch number, date of manufacture and date of expiry was not mentioned on the strips/covered with the blue ink. In the aforesaid circumstances, the legal position as explained in the case of **Thana Singh (Supra)**, cannot be made applicable to this case. Exceptional circumstances as culled out in the case of **Amarjit Singh (Supra)**, cannot be considered to be exhaustive. If prosecution is able to make out a case of another exception, the Court can consider the same in the facts and circumstances of the case.

10. Proceeding further, the recovery was effected from the plastic polythene, which had been thrown by the petitioner and thus, search of the personal body of the petitioner was not involved. As such, applicability of Section 50 of the NDPS Act is highly debatable in this case.

11. The recovered quantity of the contraband is much higher from the limit, from which the commercial category starts in respect of Etizolam, being more than 16 times. Petitioner is also involved in one more case of NDPS Act, may be of small quantity.

12. Having regard to all the facts and circumstances as noted above, but without commenting anything further on merits of the case, this Court does not find the present case to be fit for grant of bail, considering the rigors contained in Section 37 of NDPS Act.

Dismissed.

Pending application (s), if any, stands disposed of.

(DEEPAK GUPTA)
JUDGE

29.11.2023

Vivek

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| 1. Whether speaking/reasoned? | Yes |
| 2. Whether reportable? | Yes/No |