

203 **IN THE HIGH COURT OF PUNJAB AND HARYANA**
 AT CHANDIGARH
 CRM-M-23894-2016 (O&M)
 Date of Decision:11.12.2023

Surinder Kumar

...Petitioner

Vs.

State of Punjab

...Respondent

Coram : Hon'ble Mr. Justice N.S.Shekhawat

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

Mr. Mohinder Singh Joshi, AAG, Punjab.

N.S.Shekhawat J.

1. The petitioner has filed the present petition under Section 482 Cr.P.C with a prayer to quash the final report under Section 173 Cr.P.C in case arising out of FIR No.148 dated 28.06.2011 under Section 22 of NDPS Act, Police Station Sadar, Dhuri, District Sangrur and all subsequent proceedings arising out therefrom.

2. The FIR in the present case was got registered by SI Kehar Singh by alleging that on 28.06.2011, he along with other police officials were on patrolling duty and a person holding a plastic bag in his right hand and was stopped by the police on suspicion. On seeing the police party, he got perplexed and tried to turn back. However, he was apprehended and 1Kg 630 grams of intoxicating powder was recovered from him. He disclosed his name as Surinder Kumar son of Puran Ram and had committed the offence under Section 22 of NDPS Act by keeping in his possession 1Kg 650 grams of intoxicating powder without any permit or license. With these main allegations, the FIR in the present case was registered against the present petitioner.

3. Learned counsel for the petitioner contended that the alleged recovery was effected on 28.06.2011 and on 07.07.2011, the sample was deposited with the Chemical Examiner, Kharar. The Chemical Examiner submitted a report dated 16.08.2011 (Annexure P-2) and it was found that 12.10 % of Paracetamol was there in sample. Thereafter, vide the report dated 12.12.2011, the DDA, Legal advised the police to file the challan under Section 27 of the Drugs and Cosmetics Act and vide the order dated 31.12.2022, the SSP approved the said proposal. However, without joining the petitioner or serving any notice on the petitioner, the police moved an application dated 29.01.2014 to the Court of Chief Judicial Magistrate, Sangrur and requested her to return the second sample for conducting the re-testing and the second sample of 10 grams was ordered to be handed over to the police officials for the purpose of second test, vide the order dated 29.01.2014 (Annexure P-3), passed by the Court of Chief Judicial Magistrate, Sangrur. Learned counsel further contended that the Court of Chief Judicial Magistrate, Sangrur was not competent to deal with the cases under the NDPS Act and the Chief Judicial Magistrate, Sangrur without issuing any notice to the petitioner, handed over the second sample to the police officials. Even, it was not mentioned in the order by the Chief Judicial Magistrate that the second sample was sealed or not and whether the sample was intact condition as the sample was deposited on 30.06.2011 and was handed over to the police after 02 years and 06 months. The second sample was tested by CFSL, Chandigarh and it was stated to be drug powder weighing 11.58 grams. As per the said report, dated 29.09.2014 (Annexure P-4) prepared by the CFSL Chandigarh, Dextropropoxyphene, Acetaminophen, Carisoprodol and Dicyclomine were detected in the second

sample.

4. Learned counsel further submitted that as per the version of the prosecution, the Chief Judicial Magistrate, Sangrur had handed over a sample of 10 grams to the police officials, however, CFSL, Chandigarh had examined the sample weighing 11.58 grams. Since the sample was withdrawn on 28.06.2011 and was handed over to the police after 29.01.2014, the possibility of tampering with the sample could not be ruled out. Learned counsel further contended that there is no provision in the NDPS Act for testing the second sample and the order passed by the Chief Judicial Magistrate, Sangrur was totally against law. Learned counsel for the petitioner also placed reliance on the judgment passed by the Hon'ble Supreme Court in the matter of **“Thana Singh Vs. Central Bureau of Narcotics”, 2013 (2) SCC 590: 2013 (1) RCR Criminal 861.**

5. On the other hand, learned State counsel submitted that as per the first report of the Chemical Examiner the sample contained Paracetamol, however, the report of Deputy DA Legal, Sangrur was sought and he opined that the proceedings under Section 27 of the “Drugs and Cosmetics Act” should be initiated. However, the Drug Inspector had shown his inability to file the complaint as he was not the member of the police party, so a cancellation report was prepared in the said case. During the hearing of CRM-M-18861 of 2013 titled as “Karu Lal Vs. State of Punjab, some serious doubts were raised with regard to the genuineness of the Chemical Reports issued by the Assistant Chemical Examiner, Punjab. Vide the order dated 08.10.2013, this Court observed as follows:-

“Therefore, in exercise of my power conferred under Section 482 Cr.P.C, the Chief Director Vigilance Bureau Punjab, is

directed to summon, examine the entire record, ascertain in how many cases such reports were issued by the Assistant Chemical Examiner, Punjab, conduct a detailed enquiry, fix the responsibility, take appropriate legal action against the guilty person and to submit the status report in the registry of this Court before the next date of hearing.

Adjourned to 13.11.2013, to await the indicated status report.

A copy of this order be given dasti to the learned State counsel under the signatures of Bench Secretary, for its strict compliance in letter and spirit, positively.

6. Thereafter, the Inspector General of Police-cum-Director Economic Offences, Vigilance Bureau, Punjab, Chandigarh wrote a letter No.45-61/IGP dated 30.01.2014 to all the S.S.Ps in Punjab that a case FIR No.14 dated 11.11.2013 u/s 420, 467,468,471,218,201,120-B of IPC and 13 (D) read with 13 (2) PC Act, 1988 P.S Vigilance Bureau, F.S-I Punjab at Mohali had been registered against the officers/officials of the office of Chemical Examiner Kharar and further asked that the samples in the NDPS cases, which were reported to be failed as per the report of Assistant Chemical Examiner, Kharar, the second sample might be sent for analysis to CFSL, Sector-36, Chandigarh, in this regard necessary permission had been granted by this Court vide order dated 20.01.2014.

7. Consequently, a request was made to the Court of Chief Judicial Magistrate, Sangrur for returning the second sample for the purpose of sending the same to CFSL, Chandigarh for analysis and vide order dated 29.01.2014, the second sample of 10 grams containing the intoxicant powder, which was lying deposited in the Judicial Malkhana at Serial No.98 dated 30.06.2011, was

handed over to the police. The second sample was sent to Chandigarh for analysis and vide the report dated 29.09.2014, Dextropropoxyphene, Acetaminophen, Carisoprodol and Dicyclomine were found. Even the salt mentioned in Dextropropoxyphene comes under the purview of NDPS Act and the offence under Section 22 of the NDPS Act was made out against the petitioner and after the presentation of the challan, charges have been framed against the petitioner on 09.12.2015. With these submissions, learned State counsel prayed for dismissal of the present petition.

8. I have heard learned counsel for the parties and perused the record.

9. The Hon'ble Supreme Court has held in the matter of **"Thana Singh Vs. Central Bureau of Narcotics", 2013 (2) SCC 590: 2013 (1) RCR Criminal 861 as follows:-**

E. Re-testing Provisions

*23. The Narcotic Drugs And Psychotropic Substances Act itself does not permit re-sampling or retesting 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, retesting 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 retesting.

24. Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the abovestated factors. Further, in light of Section 52A of the Narcotic Drugs and Psychotropic Substances Act, which permits swift disposal of some hazardous substances, the time frame within which any application for re-testing may be permitted ought to be strictly defined. Section 52A of the Narcotic Drugs and Psychotropic Substances Act reads as follows :-

"52A. Disposal of seized narcotic drugs and psychotropic substances

(1) The Central Government may, having regard to the hazardous nature of any narcotic drugs or psychotropic substances, their vulnerability to theft, substitution, constraints of proper storage space or any other relevant considerations, by notification published in the Official Gazette, specify such narcotic drugs or psychotropic substances or class of narcotic drugs or class of psychotropic substances which shall, as soon as may be after their seizure, be disposed of by such officer and in such manner as that Government may from time to time, determine after following the procedure herein- after specified.

(2) Where any narcotic drug or psychotropic substance has been

seized and forwarded to the officer-incharge of the nearest police station or to the officer empowered under section 53, the officer referred to in sub-section (1) shall prepare an inventory of such narcotic drugs or psychotropic substances containing such details relating to their description, quality, quantity, mode of packing, marks, numbers or such other identifying particulars of the narcotic drugs or psychotropic substances or the packing in which they are packed, country of origin and other particulars as the officer referred to in sub-section (1) may consider relevant to the identity of the narcotic drugs or psychotropic substances in any proceedings under this Act and make an application, to any Magistrate for the purpose of

(a) certifying the correctness of the inventory so prepared; or

(b) taking, in the presence of such magistrate, photographs of such drugs or substances and certifying such photographs as true; or

(c) allowing to draw representative samples of such drugs or substances, in the presence of such magistrate and certifying the correctness of any list of samples so drawn.

(3) Where an application is made under sub-section

(2), the Magistrate shall, as soon as may be, allow the application.

(4) Notwithstanding anything contained in the Indian Evidence Act, 1872 (1 of 1872), or the Code of Criminal Procedure, 1973 (2 of 1974), every court trying an offence under this Act, shall treat the inventory, the photographs of narcotic drugs or psychotropic substances and any list of samples drawn under sub-section (2) and certified by the Magistrate, as primary evidence in respect of such offence."

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 retesting/re-sampling is strictly prohibited under the Narcotic Drugs And Psychotropic Substances Act.

10. Apart from that, Section 36-A of the “Act” provides that all the offences shall be triable by the Special Courts and the same has been reproduced below:-

36A. Offences triable by Special Courts.— (1) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974),—

(a) all offences under this Act which are punishable with imprisonment for a term of more than three years shall be triable only by the Special Court constituted for the area in which the offence has been committed or where there are more Special Courts than one for such area, by such one of them as may be specified in this behalf by the Government;

(b) where a person accused of or suspected of the commission of an offence under this Act is forwarded to a Magistrate under sub-section (2) or sub-section (2A) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), such Magistrate may authorise the detention of such person in such custody as he thinks fit for a period not exceeding fifteen days in the whole where such Magistrate is a Judicial Magistrate and seven days in the whole where such Magistrate is an Executive Magistrate:

Provided that in cases which are triable by the Special Court where such Magistrate considers—

(i) when such person is forwarded to him as aforesaid; or

(ii) upon or at any time before the expiry of the period of detention authorised by him,

that the detention of such person is unnecessary, he shall order such person to be forwarded to the Special Court having jurisdiction;

(c) the Special Court may exercise, in relation to the person forwarded to it under clause (b), the same power which a Magistrate having jurisdiction to try a case may exercise under section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), in relation to an accused person in such case who has been forwarded to him under that section;

(d) a Special Court may, upon perusal of police report of the facts constituting an offence under this Act or upon complaint made by an officer of the Central Government or a State Government authorized in his behalf, take cognizance of that offence without the accused being committed to it for trial.

(2) When trying an offence under this Act, a Special Court may also try an offence other than an offence under this Act with which the accused may, under the Code of Criminal Procedure, 1973 (2 of 1974), be charged at the same trial.

(3) Nothing contained in this section shall be deemed to affect the special powers of the High Court regarding bail under section 439 of the Code of Criminal Procedure, 1973 (2 of 1974), and the High Court may exercise such powers including the power under clause (b) of sub-section (1) of that section as if the reference to "Magistrate" in that section included also a reference to a "Special Court" constituted under section 36.

(4) In respect of persons accused of an offence punishable under section 19 or section 24 or section 27A or for offences involving commercial quantity the references in sub-section (2) of section 167 of the Code of Criminal Procedure, 1973 (2 of 1974), thereof to "ninety days", where they occur, shall be construed as reference to "one hundred and eighty days":

Provided that, if it is not possible to complete the investigation within the said period of one hundred and eighty days, the Special Court may extend the said period up to one year on the report of the Public Prosecutor indicating the progress of the investigation and the specific reasons for the detention of the accused beyond the said period of one hundred and eighty days.

(5) Notwithstanding anything contained in the Code of Criminal Procedure, 1973 (2 of 1974), the offences punishable under this Act with imprisonment for a term of not more than three years may be tried summarily.]

11. In the present case, the recovery of alleged contraband had taken place from the present petitioner on 28.06.2011 and 07.07.2011, the sample was deposited with the Chemical Examiner, Khahar. Vide the report dated 16.08.2011 (Annexure P-2) the Chemical Examiner, Kharar found that the contraband was having Paracetamol to the extent of 12.10 % and apparently for carrying the said powder, no offence under NDPS Act was made out. Apart from that, after receiving the said report, dated 17.08.2011, Deputy DA Legal, opined that the proceedings under Section 27 of the “Act” should be initiated. However, the drug Inspector had shown his inability to file the complaint as he was not the member of the raiding party of the police. Consequently, a cancellation report was prepared in the present case. However, as per the law laid down by the Hon’ble Supreme Court, only in very exceptional and compelling circumstances, an application for re-testing/re-sampling could be filed within a period of 15 days of receipt of the test report and no application for re-testing/re-sampling could be entertained thereafter. However, in the present case surprisingly the application was filed by the police for returning the second sample for re-testing/re-sampling and for sending the same to CFSL for analysis and vide the order dated 29.01.2014, the CJM ordered the returning of second sample of 10 grams. First of all, the Chief Judicial Magistrate, Sangrur was not competent to deal with the trial under Section 22 of the NDPS Act, as it was not a special Court constituted under the provisions of NDPS Act. Secondly, while allowing the application moved by the prosecution and handing

over the second sample for retesting/reanalysis, no opportunity of hearing was granted to the accused i.e the present petitioner and on his back, the second sample of 10 grams containing the intoxicant powder was handed over to the police for re-analysis from CFSL, Chandigarh. Further, in view of the law laid down by the Hon'ble Supreme Court, an application for re-testing/re-sampling could be entertained only under compelling circumstances and that to within a period of 15 days of receipt of test report. However, the application in question was moved by the prosecution after the expiry of 15 days in the present case. Thus, it is evident that the mandatory provisions of law and the law laid down by the Hon'ble Supreme Court in the matter of *Thana Singh (supra)* was completely overlooked by the prosecution/trial Court. Still further, even the charge was wrongly framed by the Special Court by completely overlooking the mandatory provisions of law.

12. In view of the above discussion, the present petition is allowed and the final report under Section 173 Cr.P.C in case FIR No.148 dated 28.06.2011 under Section 22 of NDPS Act, Police Station Sadar, Dhuri, District Sangrur (Annexure P-5), charge-sheet dated 09.12.2015 passed by the Court of Special Court, Sangrur and all subsequent proceedings arising therefrom are hereby quashed.

13. Pending applications is also accordingly, disposed off.

(N.S.SHEKHAWAT)
JUDGE

11.12.2023
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Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No