

IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

201

CRM-M-39944-2018

DATE OF DECISION : 28th JULY, 2023

Kartar Singh

.... Petitioner

Versus

State of Punjab

... Respondent

CORAM : HON'BLE MR. JUSTICE RAJBIR SEHRAWAT

*** * * ***

Present : Mr. P.P.S. Duggall, Advocate, for the petitioner.

Mr. Jaspal Singh Guru, AAG, Punjab.

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RAJBIR SEHRAWAT, J. (Oral)

1. This petition under Section 482/483 of the Code of Criminal Procedure has been filed for setting aside the order dated 01.08.2018 (Annexure P-4), by which re-testing of the sample has been ordered in FIR No.38, dated 16.04.2015, registered under Sections 22 & 61 of NDPS Act, 1985, at Police Station Mamdot, District Ferozepur.
2. Reply by way of affidavit of Sh. Satnam Singh, PPS, DSP (SD), Ferozepur filed by the State counsel is taken on record.
3. The main facts of this case are that FIR No.38, dated 16.04.2015 was registered against the petitioner regarding alleged possession of Alprazolam tablets. However, the tablets recovered,

though were of the same substance Alprazolam, but were of two different brands namely Alprazolam (Nindra) and Alprazolam (Alto). The samples were drawn at the relevant time by the Magistrate. One sample was sent to the FSL for testing. However, while sending the sample for testing, the sample which was sent to the FSL pertained to Alprazolam (Nindra), whereas, the form accompanying sample had mentioned Alprazolam (Alto). Because of this inconsistency, the sample was never tested by the FSL. Therefor, no report was received by the Investigating Agency. When this fact came to notice of the Court; to get the version of the concerned FSL, the Court had called the official from the said laboratory. The said person appeared before the Court and informed the Court that the sample sent by the police was pertaining to Alprazolam (Nindra) whereas the form accompanying that sample pertains to Alprazolam (Alto), therefore, no testing of the said sample was done by the laboratory. Then the prosecution agency, filed an application for sending the correct sample with the correct form. The petitioner filed objection to the said application saying that there is no provision under the NDPS Act, 1985 for re-testing of the second sample, therefore, the application filed by the prosecution was non-maintainable. Accordingly, the Court has allowed the police to send the second sample for testing; so as to prove the nature of the material recovered from the petitioner. To challenge the order, the present petition has been filed.

4. Arguing the case, learned counsel for the petitioner has submitted that since one sample was already sent, therefore, retesting of the second sample is not permissible. There is no provision under the Act enabling the prosecuting agency to get the re-testing done. Counsel

for the petitioner has relied upon judgment rendered by the Hon'ble Supreme Court in the case of ***Thana Singh vs. Central Bureau of Narcotics, 2013(1) RCR (Criminal) 861*** to buttress his arguments. Accordingly, it is submitted by learned counsel for the petitioner that, *per se*, sending of the second sample for re-testing was not permissible. Even if the same was to be done; that should have been done with due promptitude, within 15 days and only in case of exceptional circumstances. In the present case, neither there are any exceptional circumstances nor the sample was sent with due promptitude. Instant sample was sent after a period of three years of sending the first sample. Hence, the re-testing permitted by the trial Court does not satisfy the test of law laid down by the Supreme Court. Hence, the order deserves to be set aside.

5. On the other hand, learned State counsel has submitted that the case does not involve any re-testing; as such. On the contrary, the case involves only the first testing; though of second sample which has been sent with correct particulars. So far as the first sample is concerned, an inconsistency had arisen because the sample sent was pertaining to Alprazolam (Nindra) whereas accompanying form was mentioning Alprazolam (Alto). Because this inconsistency, the FSL has not even tested the first sample. Therefore, there is no report relating to the first sample as such. Accordingly, it is submitted that there is no re-testing involved in the case. Counsel for the respondent-State has further submitted that the second sample has been sent only on verification by the Court that the second sample was duly sealed and signed earlier by the then Magistrate. Since the second sample is bearing its due

authenticity, therefore, there is nothing wrong with the order passed by the trial Court, permitting the testing of the second sample, as such. Counsel has further submitted that alleged delay of three years is not relevant at all. It is the authenticity of the sample which is material and it was not even disputed before the Court below that the sample was lying in *malkhana*; as sealed and signed by the then Magistrate. Further, argument of the counsel for the State is that, in fact, the judgment of the Hon'ble Supreme Court in case of ***Thana Singh (Supra)*** is permitting even the re-testing of the sample, provided it is resorted to in exceptional circumstances and within 15 days from the date of report of the first sample from the FSL. In the present case, there is no report from FSL at all, rather, it is first testing of the second sample. Therefore, the embargo created by the judgment of the Hon'ble Supreme Court in ***Thana Singh (supra)***, if any, is not attracted in the present case. Rather, the Division Bench of this Court in ***Amarjit Singh vs. State of Punjab, 2013(4) R.C.R. (Criminal) 524***, has specifically considered this aspect and held that there can be circumstance where the first sample is not analyzed for some reason; then the prosecution can get the second sample analyzed so as to establish its case. Hence, it is submitted that there is no illegality or impropriety in the order passed by the trial Court. The present petition deserves to be dismissed.

6. Having heard learned counsel for the parties, this Court finds substance in the argument raised by the counsel for the State. Before proceedings, it deserves to be noted that there is no report ever prepared by the FSL regarding the sample which was earlier sent to it. Rather, as per record; the said sample was never analyzed by the FSL

because of inconsistency of the sample and the form accompanying that sample. In that situation, if the second sample is sent by the prosecution for first analysis itself, then it is not a case of re-testing as such. Rather, it is a case of only first testing though of the second sample. Therefore, the mere absence of the provision for re-testing in the NDPS Act, 1985 or the judgment rendered by the Hon'ble Supreme Court in case of **Thana Singh (Supra)** does not stand in the way of the prosecution qua getting the second sample tested by them. Needless to say that the second sample was also the one which was sealed and signed by the then Magistrate. Therefore, the Court below has not committed any mistake or illegality in permitting the prosecution to get the second sample tested from the FSL.

7. Although, counsel for the petitioner has relied upon judgment of the Hon'ble Supreme Court rendered in **Thana Singh (supra)**, however, even the said judgment has permitted even re-testing of the second sample despite the report of the first sample having been received by the prosecution, though in exceptional circumstances. The other condition mentioned in the said judgment is regarding the promptitude, which specifies that the second sample should be sent within 15 days of receipt of the first report from the FSL. However, in the present case, there is not at all any first report sent by the FSL. Therefore, the time period set by the Hon'ble Supreme Court in **Thana Singh (supra)** is also not attracted in the present case.

8. Though, the sample is permitted to be sent to the FSL after a period of three years, however, the delay is, mostly, attributable to the FSL who kept the sample pending with it despite the inconsistency

having come to its knowledge. When the prosecution came to know about the fact that the FSL is not conducting analysis of the first sample then they have obtained due permission from the Court and have sent the second sample for testing to the FSL. Hence, even the alleged delay in sending the sample is of no consequences; so far as the testing of the sample, as such, is concerned.

9. In view of the above, this Court does not find any merit in the present petition. The same is dismissed.

28th JULY, 2023
Ankur

(RAJBIR SEHRAWAT)
JUDGE

<i>Whether speaking/reasoned:</i>	<i>Yes</i>
<i>Whether Reportable:</i>	<i>Yes</i>