

(2008) 03 DEL CK 0204

In the Delhi High Court

Case No : Criminal Revision No. 171 of 2008

Anil Kumar

APPELLANT

Vs

Narcotics Control Bureau

RESPONDENT

Date of Decision : 27-03-2008

Acts Referred:

Citation : (2008) CriminalCC 294

Hon'ble Judges : Sanjay Kishan Kaul, J

Bench : Single Bench

Advocate : Sanjay K. Das with Mr. Kamal J.S. Mann, for the Appellant; B.S. Arora, for the Respondent

Final Decision : Allowed

Judgement

Sanjay Kishan Kaul, J.—Crl M.A.3730/2008

Allowed, subject to just exceptions.

Crl.Rev.P.171/2008

Notice, which is accepted by learned counsel for the respondent.

2. The petitioner was charged with offences under the Narcotic Drugs and Psychotropic Substances (NDPS) Act, 1985 ("the said Act" for short). Recovery was made from the petitioner of a light brown powder suspected to be heroin. The samples drawn from the seized material were sent for testing to the CRCL. The report of the CRCL shows that the material which has been tested is an off white powder which contains diacetylmorphine(heroin). The petitioner wanted a re-testing of the sample on the ground that what is alleged to have been seized from the petitioner is a light brown powder while the report is in respect of an off white powder.

3. It is further pointed out that in the deposition of PW2, once again a reference is to the sample which was opened by breaking the seal and found to contain a dark brown substance. In respect of another packet, there was a dry solid

condition of the brown substance. The request of the petitioner for such re-testing has been declined in terms of the impugned order dated 20.02.2008 on the ground that the description is off white and brown colour powder is not a major discrepancy and that the counsel for the petitioner/accused had not put in question doubting the samples during cross-examination.

4. On hearing learned counsel for the parties and consideration of the matter, I am unable to persuade myself to agree with the conclusion arrived by the learned Addl. Sessions Judge. The matter is no more *res integra* in view of the judgment of the learned single Judge of this Court in *Nihal Khan v. State*, 2007(3) C .C.C 772 (Delhi) : 2007(1) JCC (Narcotics) 37 where it has been observed in para 15 as under:

In the light of the aforesaid discussion and reasoning, it is clear that there is no bar for an accused under the NDPS Act to move an application for re-testing of samples. There is also no bar on the court allowing such an application. At the same time, it does not mean that every such application moved by any accused under the NDPS Act ought to automatically result in the court allowing the same. The Court has the power to allow or not to allow such an application. It has consider the facts and circumstances of the case and to see whether re-testing would be necessary to secure the ends of justice and to afford a fair trial to the accused. If the court, upon considering the totality circumstances, comes to the conclusion that re-testing would be necessary, then it ought to allow such an application. An illustration of a case where re-testing would be necessary is one given by the decision in *Masoom Ali* (supra) where the first test did not disclose the percentage content of diacetylmorphine and the second test became necessary for ascertaining the exact content so that the category of the offence u/s 21 of the NDPS Act could be ascertained. Another situation where re-testing could be permitted is as given in *Kailash Singh's* case (supra) where doubts are created with regard to the tampering with the case property and or samples. In such a situation where legitimate doubts arise, the court may permit re-testing. A third situation maybe where in the course of the trial it is indicate that there is a possibility that the sample sent for testing did not match the case property. This can be discerned sometimes by marked differences in colour or other appearance to the naked eye. In all such situations, it would be permissible for the court, if it so feels, to direct retesting. These instances are merely illustrative. There may be other situations where it would be necessary for the court to direct a fresh sample being taken from the case property and being sent for testing if it feels that it would secure the ends of justice and help the court in arriving at the truth.

(emphasis supplied)

5. The present case is one where there is a marked difference in colour at least in the description as contained in the report since it has not been clarified as to how the dark brown substance could be described as an off white powder in the report.

6. No doubt the petitioner has not put in questions in cross examination, but it is the duty of the Trial Court to satisfy itself that the sample is drawn from the same source which is the seized material as the consequences for an accused are severe and it is the functioning of a criminal court to make every endeavour to arrive at the truth of the matter. It is more so when the request has come from the petitioner itself and there is alleged discrepancy in colour and texture as per the deposition, description of the material as per the officer and the description in the report.

7. I am thus of the view that re-sampling is liable to be done for proper assistance to the Court. The impugned order is set aside with the direction that the samples be once again drawn, under the supervision of the Trial Court, from the seized material and sent for re-sampling to the CRCL.

8. The petition is allowed in the aforesaid terms.

Dasti.