

(2004) 10 DEL CK 0172
In the Delhi High Court
Case No : Crl M C No. 250 of 2003

Directorate of Revenue Int.	Vs	APPELLANT
Vinod Kumar and Others		RESPONDENT

Date of Decision : 12-10-2004

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 293, 482
Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 50
Prevention of Food Adulteration Act, 1954 — Section 13

Citation : (2005) 1 ALT(Cri) 28 : (2004) 114 DLT 475

Hon'ble Judges : Ramesh Chandra Chopra, J

Bench : Single Bench

Advocate : Ashish Aggarwal, for the Appellant; Sanjeev Kumar and S.K. Santoshi, for the Respondent

Final Decision : Allowed

Judgement

R.C. Chopra, J.—This petition u/s 482 of the Code of Criminal Procedure is directed against an order date 19.12.2002 passed by learned Special Judge, New Delhi by which the prayer of the respondent-accused for sending a second sample of the contraband in question to another laboratory for Chemical analysis was allowed and for this purpose, the case property allegedly recovered from the appellant was ordered to be produced in the Court.

2. I have heard learned counsel for the petitioner and learned counsel for the respondents. I have gone through the records.

Learned counsel for the petitioner has vehemently argued that under the Narcotics Drugs and Psychotropic Substances Act (hereinafter referred to as "the Act" only), the respondent-accused has no right to get another sample tested from another laboratory and as such, the impugned order is liable to be set aside. In support of his submission, he relies upon a Supreme Court judgment in Commissioner of Customs, New Delhi Vs. M/s. Punjab Stainless Steel Industries, , a Division Bench judgment of Punjab & Haryana High Court in

"Joginder Kaur Vs. State of Punjab" reported in 1979 CLR 7 P & H HC 101 and another judgment of Punjab & Haryana High Court in "Har Prasad Vs. State of Punjab" reported in 1987 (2) Crimes 675. Learned counsel for the respondent on the other hand, argues that an accused has unfettered and undefeatable right to lead any evidence in defense which may prove his innocence. He relies upon a judgment of Delhi High Court in Kailash Singh Vs. State (Delhi Administration), .

3. After considering the submissions made by learned counsel for the parties and going through the judgments relied upon by them, this court finds that the Apex Court in the case of Commissioner of Customs Vs. Punjab Stainless Steel Industries(supra) while dealing with a question as to whether the respondent could ask or not for re-testing of the samples under the Customs Act, held that a report of a Chemical examiner could be demolished by the respondent by cross-examining him and as such, the view taken by the Tribunal that the denial of opportunity to get the sample re-tested was vocative of the principles of natural justice could not be sustained. It was noticed that there was no provision in the Act which permitted re-testing of the samples. However, the Court did not go into this question any further. The Division Bench of the Punjab & Haryana High Court in the case of Joginder Kaur (supra), dealing with a similar request under the Opium Act, categorically held that the accused in his defense could not ask the Court to send another representative sample to the same or another public analyst for re-testing. It was held that the only right available to him u/s 293 of the Cr.PC was to get the expert called for cross-examination to challenge his opinion or examine another expert witness to challenge the opinion expressed by the expert on whose report the prosecution relies or rebut the said opinion with the aid of authoritative text books. A learned Single Judge of Punjab & Haryana High Court in the case of Har Prasad Vs. State of Punjab (supra) also followed the same view relying upon the aforesaid Division Bench judgment.

4. The judgment of Delhi High Court in Kailash Singh Vs. State was dealing with the provisions of Section 50 of the NDPS Act but the plea of the accused in regard to the tampering of the case property was overruled observing that the accused could have prayed to the Court for taking another sample from the remaining case property for being analysed. A perusal of this judgment shows that the question of the right of an accused to get a sample drawn again from the case property for re-testing was neither directly raised nor considered and the observations aforesaid were only passing remarks while dealing with other arguments and as such, have to be held per incurium.

5. After going through the provisions of the Act and considering the submissions, this Court is of the considered view that an accused facing trial under the provisions of NDPS Act has no right to ask the Court to order re-testing of the case property after drawing a sample from the remaining case property inasmuch as Section 293 of the Code has made the report of the forensic science experts admissible in evidence. The only right available to an accused is to rebut or demolish the said report by way of cross examination of expert or in the

alternative, produce another expert to counter the opinion given in the report or rely upon the authoritative text books to challenge the opinion given by the expert. The Division Bench judgment of the Punjab & Haryana High Court in case *Joginder Kaur* (supra) which was under the Opium Act squarely covers the issue as raised by the parties in this case inasmuch as the NDPS Act also does not confer any right upon an accused to send another representative sample of the contraband to the same or other public analyst for analysis and report.

6. It needs to be mentioned that legislature wherever it intended to confer such a right upon an accused, has specifically introduced provisions in respect thereof as in the case of Prevention of Food Adulteration Act and Drugs and Cosmetics Act, 1940 Section 13 of PFA Act expressly confers a right upon an accused to have counterpart of the sample sent to the Director CFL, which is a superior authority for analysis and opinion and it is also provided that the opinion of the Director, CFL shall supercede the opinion given by the public analyst. In the Prevention of Food Adulteration Act, not only this right has been conferred upon an accused but specific provisions also have been introduced to ensure the safe custody of the counterpart of the sample so that the second sample that may be sent to Director, CFL is not tampered with and does not lose its character till the time it is available to the Director for re-testing. In Drugs & Cosmetics Act, 1940 also specific provisions are there. In NDPS Act, however, no such right or provisions have been introduced. In case the accused is permitted to get the sample of contraband re-tested, a floodgate for manipulations as well as tampering of the case property may be opened and multiple malpractices may be introduced to avoid stringent punishments under the Act.

7. The plea that Section 80 of the Act makes the provisions of the Drugs and Cosmetics Act, 1940 applicable to the NDPS Act and since the said Act has provisions for re-testing this course should be permitted in this Act also cannot be sustained. Under the Drugs and Cosmetics Act, specific mechanism is provided for re-testing of sample in a superior laboratory established by Central Government as in the case of PFA Act but NDPS Act or Rules there under do not provide for any other laboratory for re-testing a second sample. Therefore, the provision of Drugs and Cosmetics Act, 1940 cannot help the respondent. It is to be noticed that wherever such a right is provided to an accused specific provisions as well as safeguards against manipulation of case property and second sample are provided.

8. Under the circumstances, this Court is of the considered view that the impugned order passed by the learned Special Judge allowing the request of the respondent to get a sample drawn for re-testing was unwarranted and uncalled for. The order, Therefore, cannot be sustained.

9. The petition is, Therefore, allowed and the impugned order is set aside.