

(2014) 09 DEL CK 0198
In the Delhi High Court
Case No : Crl. M.C. No. 58 of 2013

Directorate of Revenue Intelligence

APPELLANT

Vs

Anselen Lyke Nwosu

RESPONDENT

Date of Decision : 09-09-2014

Acts Referred:

Criminal Procedure Code, 1973 (CrPC) — Section 482

Drugs and Cosmetics Act, 1940 — Section 25(4)

Narcotic Drugs and Psychotropic Substances Act, 1985 (NDPS) — Section 67, 79, 80

Prevention of Food Adulteration Act, 1954 — Section 13, 13(2)

Citation : (2014) 3 JCC(Narcotics) 171

Hon'ble Judges : V.P. Vaish, J

Bench : Single Bench

Advocate : Satish Aggarwal, Advocate for the Appellant; Sikandar Azam Khan, Advocate for the Respondent

Judgement

V.P. Vaish, J.—By this petition filed under Section 482 of Code of Criminal Procedure, 1973 (hereinafter after referred to as "Cr.P.C.") the petitioner assails the order dated 19.12.2012 passed by learned Special Judge, NDPS/South & South-East District, Saket Court Complex, New Delhi whereby the application filed on behalf of respondent/accused for drawing fresh sample from the case property and for sending the same to Central Revenues Control Laboratory for analysis was allowed. Shorn off unnecessary details, the facts of the case are that on 17/18.05.2009 the respondent was found in possession of 11.019 kgs. from blue and red colour shoulder bag brand "Cello" and in the follow-up action, 962 grams of substance suspected to be heroin was recovered from the residential premises of the respondent and statement of respondent under Section 67 of Narcotic Drugs and Psychotropic Substances; Act, 1985 (hereinafter referred to as "NDPS Act") was recorded wherein he had admitted the recovery of the seized substance from his bag and other incriminating facts.

2. On 25.05.2012, the respondent/accused moved an application for drawing fresh sample from the alleged case property for re-testing/analyzing from Central

Revenues Control Laboratory for analysis. The said application was allowed by learned Special Judge, NDPS/South & South-East District, Saket Court Complex, New Delhi vide impugned order dated 19.12.2012.

3. Aggrieved by the said order, the petitioner has preferred the present petition.

4. Learned counsel for the petitioner contended that there is no provision under NDPS Act or Cr.P.C. for sending the samples for re-testing. According to him, the accused has a right to cross-examine prosecution witnesses and to lead defence evidence at an appropriate stage.

5. Learned counsel for the petitioner has relied upon letter dated 05.02.2014 sent by Director, Central Revenues Control Laboratory to Deputy Director, Directorate of Revenue Intelligence wherein it was stated that the purity percentage of any illicitly produced chemical having labile acetyl group may reduce over a period of time.

6. Learned counsel for the petitioner has relied upon the judgment in "Mankhanching Tombing vs. DRF in Criminal M.C. No. 549/2011 decided on 07.12.2011.

7. Per contra, learned counsel for the respondent urged that the petitioner is guilty of suppressing material facts. He also submitted that the trial court after considering the copies of the relevant documents i.e. Panchnama, CRCL report and testimony of investigating officer, Mr. D.P. Saxena (PW-7), allowed the application filed by the respondent for re-testing the alleged contra band articles.

8. Learned counsel for the respondent has relied upon the judgment in DRI Vs. Emmanuel Chilkezie, , wherein re-testing was allowed in relation to the facts and circumstances of the said case.

9. I have bestowed my thoughtful consideration to the submissions made by learned counsels for both the parties and carefully considered the material on record.

10. The short question involved in the present case is whether re-testing of samples under the provisions of NDPS Act is permissible or not?

11. At this juncture, it is not out of place to mention here that there is no provision for re-testing of sample or re-sampling by chemical examiner. Section 13 of the Prevention of Food Adulteration Act, 1954 expressly confers right upon an accused to have second sampling sent to Central Food Laboratory. Section 13(2) of the Prevention of Food Adulteration Act, 1954 permits a period of 10 days and Rule 56 of Central "Excise Rule, 1944 provide for "filing an application for re-testing within 21 days.

12. The legislature in, its wisdom has not provided any provision under NDPS Act or the rules framed there under for re-testing a second sample. However, under the Prevention of Food Adulteration Act, 1954? there is a specific provision for re-testing of sample in a superior laboratory established by the Central

Government. Rule 56 of Central Excise Rule, 1944 provide for filing an application for re-testing. In the absence of any specific provision under the NDPS Act, in case the accused is permitted to get the sample of contraband re-tested without any cogent reason, there is every possibility of manipulation as well as tampering with the case property.

13. The provision of NDPS Act is a self-contained code and a special Act meant for special nature of the offence. Thus, it would not be necessary to call in aid the general provisions of Cr.P.C., unless no provision has been made for re-testing or re-sampling under NDPS Act. It may be that if resampling is done after a gap of considerable duration, there may be great variation in percentage of active content, it may be because of improper storage or natural products prone to get infected with bacterial and fungal micro-organisms, which may cause a change in chemical composition of organic material by decomposition, partly or fully.

14. In letter dated 05.02.2014 written by Director, Central Revenues Control Laboratory to Dr. Manoj Kumar, Deputy Director, Directorate of Revenue Intelligence, Delhi Zonal Unit, it has been stated as under

"Following usual factors may reduce purity percentage of any illicitly produced chemical having labile acetyl group (as is in diacetylmorphine) over a period of time.

(i) Presence of ; impurities-in seized material and their nature (including organic solvents i.e. methanol, ethanol or acetone etc.).

(ii) Presence of moisture in seized material,

(iii) Presence of microbial contaminants in seized material,

(iv) Temperature during storage period,

(v) Intensity of light during storage period,

(vi) Level of humidity in storage area,

(vii) Packing condition of seized material etc."

15. The controversy is no more res Integra in view of the dictum of the Hon'ble Supreme Court of India in "Thana Singh vs. Central Bureau of Narcotics". The Hon'ble Supreme Court of India after considering the relevant provisions of Sections 79 and 80 of NDPS Act and Section 25(4) of the Drugs and Cosmetics Act, 1940, observed as under:--

"27. Therefore, keeping in mind the array of factors discussed above, we direct that, after the completion of necessary tests by the laboratories concerned, results of the same must be furnished to all parties concerned by the matter. Any "requests as to re-testing/re-sampling shall not be entertained under the NDPS 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 case 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 re-testing/re-sampling is strictly prohibited under the NDPS Act."

16. In the instant case, as per case of prosecution the contraband article i.e. 11.019 kgs. from blue and red colour shoulder bag brand "Cello and in the follow-up action, 962 grams of substance suspected to be heroin was recovered on 17/18.05.2009. The respondent/accused moved an application for drawing fresh samples and for sending the same to the Central Revenues Control Laboratory on 25.05.2012 J. i.e., after more than three years. In view, of the dictum of the Hon"ble Supreme Court of India in Thana Singh's case (supra), the re-testing/re-sampling can be entertained in extremely exceptional circumstances and for cogent reasons to be recorded by the Presiding Judge. In the present case , no such exceptional circumstances or cogent reason has been shown for re-sampling or re-testing. The sequitur of the above discussion is that there is no cogent reason for drawing re-sample/fresh sample for chemical analysis. Thus, the petition is allowed and the impugned order dated 19.12.2012 passed by learned. Special Judge, NDPS/South & South-East District, Saket Court Complex, New Delhi is set-aside.

Crl. M.A. Nos. 3503/2014 and 244/2013

Both the applications are dismissed as infructuous.