

(2023) 05 SHI CK 0120

In the High Court Of Himachal Pradesh

Case No : Criminal Revision No. 699 Of 2022

State Of Himachal Pradesh

APPELLANT

Vs

Madan Lal

RESPONDENT

Date of Decision : 22-05-2023

Acts Referred:

Central Excise Rules, 1944 — Rule 56

Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20, 52A, 53, 79, 80

Drugs And Cosmetics Act 1940 — Section 25(4)

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

Citation : (2023) 05 SHI CK 0120

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : Y.P.S. Dhaulta, Rupinder Singh, Karan Singh

Final Decision : Dismissed

Judgement

Jyotsna Rewal Dua, J

1. A sample of cannabis drawn by prosecution from the recovered bulk quantity was sent for scientific examination on 25.02.2022. The analysis report came on 28.03.2022. Prosecution at this stage felt the need to have the entire recovered contraband tested. Application moved for this purpose on 05.07.2022 was dismissed by the learned trial Court on 21.07.2022, hence this revision petition.

2. Prosecution case is that :-

2(i) 1.8 Kg. of cannabis was seized from respondent-accused on 23.02.2022.

2(ii) On 24.02.2022, the recovered contraband was forwarded to Judicial Magistrate in terms of Section 52A of the Narcotic Drugs and Psychotropic Substance Act, 1985 (in short the Act) for certification of inventory. Two samples each of 26 Gms.were drawn from bulk cannabis. Consequently, three parcels were made i.e. two sample parcels of 26 Gms.each and remaining third bulk parcel of 1.748 Kg.

2(iii) On 25.02.2022, one of the sample parcels (weighing 26 Gms.) was sent for chemical analysis to State Forensic Science Laboratory (SFSL), Junga. Its report was received on 28.03.2022.

2(iv) While scrutinizing the case, the Public Prosecutor raised the objection that entire cannabis recovered from the accused had to be analysed chemically, whereafter the remaining cannabis i.e. bulk parcel (1.748 kg. Gms) and the other sample parcel (26 Gms.) were sent for chemical analysis to SFSL, Junga on 09.06.2022. The scientific expert on 10.06.2022 refused to analyse these parcels without order of the Court.

Hence, the prosecution on 05.07.2022 moved an application for chemical analysis of the remaining cannabis contained in two parcels i.e. bulk parcel, weighing 1.748 Gms. and the sample parcel weighing 26 Gms.

This application was dismissed by the learned Special Judge on 21.07.2022, hence the prosecution instituted this revision petition on 01.11.2022.

3. Notice of this petition was issued to the respondent-accused on 06.12.2022 for his appearance on 06.03.2023. He was duly served, but did not remain present in the Court on 06.03.2023. Therefore, bailable warrants were issued against him returnable for 26.04.2023. On the next date, i.e. 26.04.2023, cognizance was taken of a certificate dated 21.04.2023 issued by the Superintendent (Jail), District-cum-Open Air Jail, Chamba certifying that the respondent-accused was admitted in the said jail on 26.02.2022 in FIR No. 1 of 2022, dated 23.02.2022 registered under Section 20 of the Act and that he was presently confined in the said jail. In view of the above, Mr. Karan Sharma, learned Advocate, was appointed as Amicus Curiae vide order dated 01.05.2023.

4. I have heard learned Amicus Curiae and the learned Additional Advocate General for the petitioner.

4(i) Following question is involved in the case :-

Whether any request or application preferred by the prosecution for re-testing and re-examination of the remaining quantity of recovered contraband i.e. cannabis weighing 1.748 Kg. + 0.026 Kg. = 1.774 Kg. can be entertained under the Act, as a matter of course ?

4(ii) Hon'ble apex Court in (2013) 2 SCC 590 Thana Singh Vs. Central Bureau of Narcotics, held that NDPS Act itself does not permit re-sampling or re-testing of sample. Re-testing 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. Re-sampling 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. The apex Court further observed that a reverence must also be given to the wisdom of the legislature when it expressly omitted out a provision, which otherwise appears as a standard one in other legislations viz. the Customs Act, the Drugs and

Cosmetics Act etc. The legislature unlike the NDPS 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 re-testing. Hence, the Hon'ble apex Court considered it imperative to define re-testing rights, if at all, as an amalgamation of the above-stated factors. Taking note of Section 52A of the Act, it was held that after completion of necessary test by the laboratories concerned, result of the same must be furnished to all parties concerned with the matter. Any request for re-testing/re-sampling was not to be entertained under the 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 15 days of the receipt of test report. No application for re-testing/re-sampling was to be entertained thereafter. In absence of any compelling circumstance any form of re-testing/re-sampling will be strictly prohibited under the Act. It would be appropriate to extract hereinafter relevant paras from the judgment :-

"F. Re-testing provisions

24. The NDPS Act itself does not permit re-sampling or re-testing 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 Vs. Deepak. P. Shah; Nihal Khan Vs. The State (Govt. of NCT Delhi) or perhaps to Sections 79 and 80 of the NDPS 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 NDPS Act, re-testing 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 NDPS 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 re- testing.

25. Hence, it is imperative to define re-testing rights, if at all, as an amalgamation of the above- stated factors. Further, in light of Section 52A of the NDPS 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.

26. Section 52-A of the NDPS 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- in- charge 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.”

27. 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 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 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 re-testing/re-sampling is strictly prohibited under the NDPS Act.”

4(iii) A contention has been raised that decision in Thana Singh’s case (supra) is not applicable where the applicant seeking re-testing is the prosecution. The argument is not convincing. Ratio of the above judgment is equally applicable to the requests of re-testing/re-sampling whether made on behalf of prosecution or on behalf of accused. Principle of law, settled, cannot be diluted merely on the basis of who the applicant is.

4(iv) A further argument has been raised by the prosecution that the decision in Thana Singh’s case (supra) will not be applicable to the instant case as prayer in the application was not for re-testing or re-sampling of the contraband but for scientific examination of remaining bulk which was not sent for testing ever before. The submission is misconceived. Re-testing/re-sampling is not just confined to the sample already tested/sampled/taken out. The phrase includes within its ambit seeking tests of remaining sample/bulk quantity not previously tested. In absence of compelling circumstances, all kinds of re-testing/re-sampling are prohibited. It is the pleaded case of prosecution that while issuing certificate under Section 52A of the Act, the mode and manner of making the bulk of contraband homogenous before drawing two samples was not specified. That there is no material on record to show or to suggest that samples drawn were representative samples.

4(v) In the instant case, 1.8 Kg. of cannabis was recovered on 23.02.2022. The samples were drawn on 24.02.2022. Two sample parcels each of 26 Gms. were made by drawing the cannabis from the bulk quantity. The third parcel was the bulk parcel. On 25.02.2022, one of the sample parcel weighing 26 Gms. was sent for chemical analysis to SFSL, Junga. The chemical analysis report was received on 28.03.2022. It was on 05.07.2022 that the prosecution filed the application with a prayer to pass an order for allowing the investigating agency for sending entire remaining bulk of contraband for examination of cannabis weighing 1.774 Kg. (sample parcel weighing 0.026 Gms. + parcel containing remaining bulk contraband weighing 1.748 Kg.) The application was moved way beyond the period of 15 days. In fact the application was moved almost four months after the receipt of chemical analysis report submitted by SFSL, Junga.

In view of law laid down in Thana Singh’s case (supra) prayer for re-testing/re-sampling could not have been allowed. Learned trial Court was justified in dismissing the application. There were no compelling circumstances to permit re-testing/re-sampling. We are now in May, 2023. Almost 15 months have passed since the date of receipt of chemical analysis report from SFSL, Junga. Possibility of manipulation, tampering with the case property, improper storage of natural product, infection with bacterial and fungal micro-organisms which may cause

change in chemical composition of organic material by de-composition etc. cannot be ruled out.

5. For all the above reasons, prayer of the petitioner for re-testing and re-sampling was not in conformity with the settled legal position and provisions of the Act. Learned Courts below rightly dismissed the application of the petitioner. The revision petition is accordingly dismissed alongwith the pending applications, if any.

Before parting, this Court places on record its appreciation for the valuable assistance rendered by Mr. Karan Sharma, Advocate, learned Amicus Curiae.