



IN THE HIGH COURT OF HIMACHAL PRADESH, SHIMLA

Cr. Appeal No. 389 of 2005

Date of Decision : July 3, 2013

State of Himachal Pradesh

...Appellant

Versus

Deen Mohd.

...Respondent

Coram:

The Hon'ble Mr. Justice Dev Darshan Sud, Judge

The Hon'ble Mr. Justice Sanjay Karol, Judge.

Whether approved for reporting?¹ No.

For the appellant : Mr. B. S. Parmar, Additional Advocate General,
Mr. V. S. Chauhan, Addl. A.G. and Mr. Vikram
Thakur, Dy. A.G. for the appellant-State.

For the respondent : Mr. Ramesh Sharma, Advocate, for the
respondent.

Dev Darshan Sud, J. (Oral)

Cr. MP No. 270 of 2013

When this appeal was taken up for hearing, learned counsel for the respondent drew our attention to the Judgment rendered by the Supreme Court in *Thana Singh vs. Central Bureau of Narcotics*, (2013) 2 SCC 590 to urge that reanalysis of the sample which has been sent after a period of more than nine years was impermissible in law. It was submitted by learned counsel for the respondent that there is no jurisdiction vested in this Court to exercise power under

Whether reporters of Local Papers may be allowed to see the judgment? Yes.



the provisions of Section 391 of the Cr. P.C. In *Thana Singh's* case (supra) the Supreme Court holds:-

*"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 v. Deepak P. Shah* (2001 Cri LJ 2690) and *Nihal Khan v. State (Govt. of NCT of Delhi)*(2007 Cri LJ 2074)] 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 the light of Section 52-A 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:

"52-A. 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 consideration, 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 the Government may, from time to time, determine after following the procedure hereinafter 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 laboratories concerned, 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."

2. Submission made by the learned counsel appearing for the respondent that if this power is not available with the trial Court and the Supreme Court after interpretation of the relevant provisions of law severely curtailed the power of the trial Court for ordering re-sampling, it cannot be resorted to after a period of nine years by this Court in appeal more so when nothing exceptional has been brought on record.

3. Learned counsel also submits that it is in rare cases that these powers can be invoked within a reasonable time. We do not consider nine years to be a reasonable period.

4. In these circumstances we hold that it will not be open for the State to rely upon this report (Ext. HC-1). Application is disposed of accordingly.

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5. The State is aggrieved by the judgment of the learned Sessions Judge, Chamba, Chamba Division, Chamba, H.P. acquitting



the accused for offence under Section 20 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the Act).

6. A number of submissions have been made by the learned Additional Advocate General that the learned trial Court has not appreciated the evidence of the prosecution in its true perspective in accordance with the law laid down by the Supreme Court in *C. Magesh & others vs. State of Karnataka*, (2010) 5 SCC 645.

7. Before advertng to this submission, what we find is that Ext.-PW 10/A, the report of the Chemical Analyst states that on microscopic examination cystolithic hair were present, the Beam's Alkaline Test was positive and resin content was found to be 25.14% and 26.11% and opined that the contraband substance contained the contents of charas.

8. In Criminal Appeal No. 391 of 2002, titled as *State of H.P. versus Subhash Sharma @ Bhasi*, decided on 19.9.2011 the Division Bench of this Court holds:-

"15. The cystolithic hair is a fiber which could also be found in flowering tops of the cannabis plant, but the definition of charas does not include other parts like flowering and fruiting tops, leaves or stem. The definition of charas is given in Section 2 (iii) (a) of the Act. Charas, is, the separated resin, in whatever form, whether crude or purified, obtained from the cannabis plant and also includes concentrated preparation and resin known as hashish oil or liquid hashish.



*Since it does not make any mention whether this resin was of a cannabis plant. Therefore, in our opinion the report of analysis is discrepant. The Division Bench of this Court in which one of us (Surinder Singh, J) was also one of the Members **Sunil Kumar versus State Latest HLJ 2010 (HP) 207** examined almost similar reports in a Bunch matters and taking note of the aforesaid definition of charas under the Act viz-a-viz the statement of the Experts recorded during the trial as well as before this Court, held that charas should be resin of cannabis plant only or the concentrated preparation and resin known as hashish oil or liquid hashish. Thus, in absence of the fact that it was also that of a cannabis plant, result of analysis cannot be said to have in conformity with the definition of charas. As such the accused persons were given the benefit of doubt and were accordingly acquitted.*

16. In the instant case, as already stated above, firstly the sample so analyzed by the laboratory could not be connected with the recovered stuff and secondly report of the analysis is falling short of requisite parameters to be in conformity with the definition of charas. Therefore, in our considered opinion, the acquittal of the respondent cannot be interfered with. As such the appeal sans merit and is accordingly dismissed.”

9. This judgment has also been followed in *Cr. Appeal No. 172 of 2006, titled as State of H.P. vs. Ramesh Kumar*. We, therefore, hold



that the prosecution has been unable to prove its case against the accused in accordance with law. Appeal stands dismissed. Bail bonds furnished by the accused stand discharged. Pending application(s), if any, also disposed of.

**(Dev Darshan Sud),
Judge.**

**(Sanjay Karol),
Judge.**

July 3, 2013 (PK)