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Court : Kerala

Decided On : Dec-08-2015

Judge : The Honourable Mrs. Justice Mary Joseph

Appeal No. : Crl.MC. No. 1238 of 2015

Appellant : Subair

Respondent : State of Kerala Represented by the Cbcid, Malappuram

Judgement :

1. The petitioner is the first accused in S.C.No.12/2014 pending before the Special Judge, NDPS Cases, Vadakara. He has approached this Court under Section 482 of the Code of Criminal Procedure (for short 'the Code') seeking to set aside Annexure A7 order dated 24.11.2014 passed by the said court in Crl.M.P.No.584/14 in S.C.No.12/2014.

2. The facts of the case in brief are as follows : On 28.06.2011 the petitioner herein along with three other accused were found in possession of brown sugar, kept for the purpose of sale, without any authority and thereby committed the offence punishable under Section 21(c), 29 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (for short 'the NDPS Act'). The crime in this case was registered by the Sub Inspector of Police, Perumpadappu Police Station, as FIR.No.212/2011 dated 28.06.2011, alleging the commission of the offence, punishable under Sections 21(c) and 29 of the NDPS Act. The allegation of the

prosecution was that the petitioner along with three other accused were caught while engaged in selling brown sugar at three different places in Malappuram district. The specific case of the prosecution against the petitioner was that he was engaged in selling brown sugar near Taj Theatre at Palappetty in Malappuram District. The investigation was initiated and completed by CBCID, Malappuram and a final report was filed on 20.01.2014, charge sheeting all the four accused including the petitioner. Annexure A2 is the copy of the final report. The investigating officer took three samples each of 10 grams from the 900 grams of brown sugar allegedly seized from the petitioner, put marks thereon as S1, S2 and S3 and forwarded those before the NDPS Court, Vadakara along with the remaining 870 grams of brown sugar. These items were produced before the court as per PR.No.29/2011. The samples marked as S1, S2 and S3 were forwarded to the Chemical Examiner's Laboratory for chemical analysis and a report was obtained from the Regional Forensic Science Laboratory, Police Department, Government of Kerala, signed by the Assistant Director of the said laboratory. The report goes to show that the samples analysed as S1, S2 and S3 from PR.No.29/2011 contained Diacetyl morphine known as brown sugar.

3. The accused No.4, after his arrest had confessed before the Investigating Officer to the effect that the contraband seized from his custody is not brown sugar but only a powder having semblance. He conferred further that if Avil-25, Varalium-5, chocolate powder and sugar are provided to him, he would prepare such a powder. Accordingly the accused No.4 was made to create such a powder by providing the ingredients as stated by him in his confession. Samples were taken therefrom, packed and sealed in the presence of the witnesses and those were also forwarded to the Regional Forensic Science Laboratory, Police Department, Government of Kerala as per PR.No.64/2011 for chemical analysis. The copy of the seizure mahazar prepared is appended along with as Annexure 3. Report was obtained from the Regional Forensic Science Laboratory after analysis of the said sample (PR.No.64/2011) stating that the sample forwarded does not contain any narcotic and psychotropic substance.

4. The definite case of the accused was that he had prepared a powder incorporating Avil-25, Varelum-5, chocolate powder and sugar, in order to pass it

on to his customers under the guise that it is brown sugar intending thereby to make quick and easy money. The very same contention was taken by accused No.3 while applying for bail on 15.11.2011. The true copy of the said bail application is also appended along with as Annexure 4.

5. Heard Sri.G.Sreekumar (Chelur), the learned counsel appearing for the petitioner and the learned Public Prosecutor appearing for the respondent State.

6. The specific argument put forth by the learned counsel for the petitioner was that the first accused along with other accused had filed an application before the Special Judge (NDPS Cases), Vadakara as Crl.M.P.No.584/2014 in S.C.No.12/2014 pending on its file, seeking thereby to send item No.3 in the seizure mahazar prepared on 25.06.2009, for chemical analysis to the chemical examiner's laboratory. Item No.3 is 870 grams of brown sugar left behind after taking out three samples of 10 grams each from the brown sugar allegedly seized from the petitioner. It is the contention of the petitioners that sample bearing No.S1 to S3 were not taken from the quantity allegedly seized. But those were manipulated by the prosecution solely to strengthen their case after the alleged seizure. According to them, the contraband allegedly seized from their custody was not brown sugar but only a powder having semblance to that of brown sugar prepared by them by mixing certain ingredients in a particular proportion. Therefore in order to establish their case item No.3 was required to be sent for a further analysis.

7. The learned Public Prosecutor had filed a counter in the said Crl.M.P.No.584/2014, opposing the application elaborating his contentions therein. The learned Special Judge (NDPS Act cases), Vadakara after hearing the rival contentions put forth by the counsel on either side dismissed the application filed by the petitioner. It is aggrieved by the said order that accused No.1 has approached this Court, seeking to quash the same.

8. It is urged by the learned counsel on behalf of the petitioner that the court below has gone wrong in dismissing his application seeking to forward item No.3 for a second chemical analysis. According to him, the application was made by him within 15 days after receiving a copy of the chemical analysis report examining S1

to S3. According to him, he had a definite case right from the very genesis of the case that the contraband seized from his custody was not brown sugar but only a powder having semblance with brown sugar prepared by him on his own after mixing ingredients such as Avil-25, Valium-5, chocolate powder and sugar. According to him his intention behind was to sell it under the guise that the powder is brown sugar and to ease making profits. It is also his case that the investigating agency was well convinced that the contraband seized from him is not brown sugar, but, booked him in the crime falsely, solely to harass him. According to him, the samples forwarded by the prosecution is not a sample taken from the contraband seized from him but, from real brown sugar available in their custody. According to him it is impossible for an illiterate man like him to be in possession of a huge quantity of 900 grams of brown sugar as alleged. It is urged by the learned counsel that in the aforesaid circumstances, this Court's intervention in the matter under challenge is utmost warranted. It is contended by him that if samples taken from the 870 grams of contraband available in the custody of the court is forwarded to the chemical examiner's laboratory as requested by him, the truth could be unveiled and his innocence could be brought to light. Lastly and finally it is urged by the learned counsel that the prosecution is not going to be prejudiced in any way by sending the remaining 870 grams of the contraband in the custody of the court for a second analysis, so as to enable him to establish his innocence.

9. Per contra, the learned Public Prosecutor has submitted that the petitioner has no case that the seizure of the contraband articles from his possession and its sampling and sealing have been effected in utter violation of the mandatory requirements projected in various provisions of the NDPS Act. According to him, in the absence of an allegation to that effect, it is improper for the court to send the sample for second analysis to the Regional Chemical examiners laboratory and to obtain a report. It is also submitted by the learned Public Prosecutor that in the absence of a specific case for the petitioner that the article already sent for analysis was tampered in any manner, it is not proper on his part to seek for a further analysis of the entire remnants in the custody of the court. According to the learned Public Prosecutor the court below was perfectly justified in passing the order which is under challenge.

10. The learned counsel for the petitioner has also drawn my attention to three decisions, to gain support to his arguments.

11. The decision cited firstly by the petitioner is *State of Kerala v. Deepak Shah* [2001 CrI.L.J.2690]. It is a case wherein the prosecution has approached the court seeking to send another sample available in the custody of the court for an analysis to the Forensic Science Laboratory, Thiruvananthapuram. The request of the prosecution was turned down by the learned Judge, stating that no provision is there in the Narcotic Drugs and Psychotropic Substances Act empowering the court to send a second sample for chemical analysis as prayed for. When the aggrieved prosecution approached this Court in challenge, the court held:

"6. It is true that the NDPS Act does not specifically refer to the forwarding of a second sample for analysis. It is also true that some of the enactments like P.F.A. Act provides for forwarding a second sample. This also, according to me, is insufficient to conclude that a Court dealing with NDPS substance is disabled from sending a second sample for analysis in the circumstances of the case and if the interest of justice so requires. This Court had already considered this aspect though on motion made by the accused in CrI.M.C.No.4208 of 1997 and 4213 of 1997 and concluded that even in the absence of specific provision, request for sending a second sample for analysis can be allowed.

7. If the accused can make such a motion, definitely the prosecution also can do the same. After all what is paramount is interest of justice and just like the accused has a right to establish that the item seized is not a prohibited item under the Act, the prosecution also can avail of adequate opportunity to forward a second sample to establish that the case alleged by the prosecution is correct and for that purpose seek forwarding of a further sample to a more competent Laboratory. On the facts of the present case, I am satisfied that the motion for sending a second sample to the Laboratory at Trivandrum is well justified."

Accordingly the prayer of the prosecution was allowed by this Court.

12. The decision cited secondly by the petitioner is *Nihal Khan v. State(Govt. of NCT of Delhi)* [2007 CrI.L.J. 2074. In the said case, an accused charged with an

offence under Section 21 of the Narcotic Drugs and Psychotropic Substances Act, 1985, had approached the Delhi High Court for retesting of samples and the Court held:

"It is clear that there is no bar for an accused under the NDPS Act to move application for retesting of samples. There is also no bar on the court in 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 to 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 of 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 under S.21 of the NDPS Act could be ascertained. Another situation where re-testing could be permitted is one given in Kailash Singh's case (supra) where doubts are created with regard to the tampering with the case property and the samples. In such a situation where legitimate doubts arise, the Court may permit re-testing. A third situation may be where in the course of the trial it is indicated 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 permit re-testing. 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."

13. The decision cited thirdly for reference is Thana Singh v. Central Bureau of Narcotics [2013 CrL.J. 1262], wherein the Apex court has laid down certain directions and guidelines for due observance by all concerned as the law declared

under Article 141 of the Constitution of India. The Apex Court has laid down the directions and guidelines in exercise of the power vested on it under Article 32 of the Constitution of India for enforcement of fundamental rights, especially the cluster of fundamental rights incorporated under Article 21, which stood flagrantly violated on account of the state of affairs of trial of cases coming within the purview of the NDPS Act. It is clarified in the case supra that the directions are restricted solely to be observed in proceedings under NDPS Act. The directions are confined to matters of adjournments, examination of witnesses, work load of the courts, narcotics lapse, personnel functioning in the said lapse, retesting provisions, monitoring agency, public prosecutors who have a role to play in the administration of justice and other matters. The specific directions with regard to retesting provisions are contained in paragraph 23 of the said case and it is quoted herein below:

"23. 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 retesting 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; Nihal Khan v. 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, retesting 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."

14. It has been specifically laid down that the provisions of the NDPS Act by itself do not permit retesting of samples. It has been observed by the Apex court that even then there has been a trend to the contrary and NDPS courts are frequently obliged to applications for retesting or re-sampling. It is held that these applications often add to delays as they are received at advance stages of trials after significant elapse of time.

15. In the case on hand, it is revealed from the averments in Crl.M.P.No.584/2014 that the application for second analysis was filed by the petitioner, immediately after receiving the chemical analysis report from the Regional Chemical Examiner's Laboratory and examining the samples forwarded (S1 to S3) and therefore there is no scope for a contention that the second analysis was applied belatedly as a tactics to delay the proceedings. The court below has also observed in the impugned order that the petitioners had approached the court at an early opportunity available to him i.e., after receipt of the chemical analysis report by the court. Therefore, at any stretch of imagination, it cannot be said that the petitioner in the case on hand had intended to delay the proceedings.

16. What actually emerged from the decisions cited supra was that even though any provision is lacking in the NDPS Act enabling an accused to apply for retesting of a sample for analysis, the law is settled by judicial pronouncements of the Apex Court that in extremely exceptional circumstances, the accused can approach the court and the court is free to exercise its discretion based on circumstances projecting its expediency in the interest of justice to direct the same. A Single Bench of this Court in Deepak Shah's case (supra) has also extended the exercise of such a discretion by the Court even in a case where the applicant for retesting is the prosecution. Therefore, in order to get a favourable order in an application for retesting of the sample, either the prosecution or the accused has to convince the court that there exists a reasonable and genuine ground.

17. The N.D.P.S.Act does not incorporate within it any specific provision directing retesting of the contraband. Provisions indicative of barring exercise of such authority are also not there. Therefore, N.D.P.S.Courts have been frequently

issuing orders to applicants approaching before it seeking the relief of retesting. But, it is not obligatory for the N.D.P.S.Courts to issue orders in favour of the applicant without looking into the bona fides of the applicant, demanding the relief. It is only discretionary for the court and while exercising the discretion, the court has to see whether it is a tactics of the applicant to protract the trial. The court has to be convinced whether retesting is sought to secure the defence, when the applicant is the accused, or to prove its case when the applicant is the prosecution. The Apex Court as well as this Court had occasions to deal with situations of the nature and have already shown green signal, irrespective of the fact that the applications are put forth either by the accused or by the prosecution. What the Apex Court signals is to avoid filing applications after significant elapse of time at advanced stages of trials. Therefore, when an application is filed seeking retesting, it is obligatory for the Court to see whether it was filed as a delay tactics or whether it is expedient in the interest of justice to afford fair trial to the accused or that would help the prosecution to establish its case. Or in other words, the court must look from the point of view of the accused or the prosecution, whoever be the applicant before it, and to arrive at the conclusion from the backdrop of each case, whether retesting is justified or not or whether declining the same would perpetrate injustice. Some of the situations given in illustration wherein the court is justified in granting the reliefs are:-

(1) to ascertain the exact content of the narcotic and psychotropic substance contained in the contraband in a case where the report of first analysis is silent on that aspect;

(2) to clarify doubts regarding tampering with the case property and samples;

(3) to see whether the sample sent for testing did not match the case property (when there is marked difference in colour or other appearance to the naked eye) (The situations hereinabove mentioned are not exhaustive, but only some illustrations)

Therefore, the criteria for the court while considering applications seeking retesting is to be convinced of the ends of justice meant to be secured and the truth to be arrived at and protected.

18. In the backdrop, this Court has to shoulder the task to see whether extremely exceptional circumstances exist in the case on hand for the accused to resort to such a recourse. It is the specific case of the accused, who is the applicant before the Special Judge, NDPS cases, Vadakara, that the samples bearing No.S1 to S3, which have been primarily forwarded to the Chemical Examiner's Laboratory by the investigating agency were not taken from the contraband allegedly seized from him and that those samples were planted by the Investigating Agency solely to wreck vengeance on him. The petitioner has no dispute that the samples bearing Nos.S1 to S3, have been forwarded to the Chemical Examiner's Laboratory for analysis and a report dated 22.09.2011 was obtained stating that those samples contain Diacetylmorphine (brown sugar). The specific case of the petitioner was that the samples sent as S1 to S3 for analysis were not the original samples taken from the contraband at the time of seizure, but manipulated ones. But, in paragraphs 6 and 7 of the petition filed as C.M.P.No.584/2014 before the Special Judge(NDPS Cases), averment is made by the petitioner in specific terms to the following effect:

"6. In the above circumstances, in order to establish the case of the accused it is highly necessary to send item No.3 allegedly contained 870 gms of brown sugar for chemical analysis otherwise the accused would be put to irreparable losses and hardships.

7. The chemical report in PR.No.64/11 shows it does not contain any narcotic or psychotropic substances. The definite case of the accused is that the entire quantity is planted by the police subsequently to make false evidence. Accused strongly doubts that and believe that the item No.3 is also planted by the police."

19. Therefore, the specific case of the petitioner in the case on hand was that S1 to S3 as well as item No.3 i.e.,870 grams of contraband remaining with the court were planted by the police. When the case of the petitioner was that the 870 grams of contraband, which is sought for retesting is also planted one, no purpose would be served by sending the same for retesting.

20. In the factual matrix available, retesting even if permitted would not achieve the result as desired by the petitioner. In view of the dictums cited supra, the court

dealing with situations of the nature has to see whether retesting would be necessary to secure the ends of justice and to afford fair trial to the accused. In the peculiar circumstances of the case on hand, the prayer of the petitioner if allowed, would neither secure the ends of justice nor afford fair trial to him.

21. Going by the impugned order, the court below has also stated elaborately the reasons for declining the prayer of the petitioner for retesting and therefore, it does not call for any interference.

In the result, this Crl.M.C. is dismissed.

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