IN THE HIGH COURT OF BOMBAY AT GOA

LD-VC-CRI-61-2020

Antonio Manuel Faria Ramos … Applicant

Vs

State of Goa & Anr. … Respondents

Shri A.S. Khandeparkar with Shri Rohan P. Desai, Advocate for the Applicant.
Shri Gaurish Nagvenkar, Additional Public Prosecutor for the Respondents.

Coram: DAMA SESHADRI NAIDU, J.

Date: 21 December 2020

ORAL ORDER :

The petitioner is the accused in crime no.27/2019, registered by Anti-Narcotic Cell, Police Station, Panaji-Goa. The alleged crime attracts Section 21(c), 22(c) and 20(b)(ii)(B) of the NDPS Act. Arrested and sent in judicial remand on 30.12.2019, the petitioner could not succeed in getting the regular bail from the Trial Court. Then, he has filed LD-VC-BA-32-2020 before this Court.

2. When this Court took up the bail application for disposal, the learned Additional Public Prosecutor informed the Court that there was a technical lapse in the authorities' weighing the substance. According to him, the substance was weighed along with the sachet, though in the presence of the Magistrate. He also informed the Court that on the very same day, the prosecution had applied to the Trial Court to have the substance reweighed. Therefore, he wanted the matter adjourned by a couple of weeks, so that, this Court would come to know the net weight of the contraband very soon. With that information available, the Court will know whether the quantity is

commercial or otherwise. Therefore, after passing a detailed order on 01.09.2020, the Court adjourned the matter.

3. Before the Trial Court, the Anti-Narcotic Cell (ANC) has filed Exbt. D/8 application. Through that application, it has sought the Trial Court's permission to re-open the exhibits marked as Exhibit A-Balance, Exhibit B-Balance and Exhibit C-Balance in the presence of the Jt. Mamlatdar and Executive Magistrate-IV of Salcete Taluka, Margao, and to weigh the contraband in order to find out the actual weight of the contraband and that of the Polythene packets containing the contraband. This weighing will determine the net quantity of the substance, and the net weight reveals whether the contraband is of commercial quantity or otherwise.

4. The Trial Court allowed that application through its order, dt.23.09.2020. Aggrieved, the petitioner has come to this Court under section 482 of Cr PC.

5. Shri A.S. Khandeparkar, the learned counsel for the petitioner, has submitted that there is no provision in the NDPS Act enabling the ANC to get the samples reweighed. The CFSL report, he points out, has already arrived. In fact, at the very beginning, in January 2020, the substance was weighed before the Magistrate as per section 52(A) of the NDPS Act. He has also submitted that viewed from any perspective, the prosecution's request for reweighing does not fall in any extraordinary exceptions under that provision.

6. Even if we assumed there were extraordinary circumstances, Shri Khandeparkar points out, the aggrieved person must apply in 15 days after the CFSL report was received. For this contention, he relies on *Thana Singh v. Central Bureau of Narcotics*[1]. Besides, he has also

1 (2013) 2 SCC 590

relied on this Court's decision in *Shailesh Kanada v. Intelligence Officer*[2]. Shri Khandeparkar contends that reweighing is nothing but resampling, and it cannot be undertaken for the mere asking. On this count, he relies on *Union of India v. Mohanlal*[3].

7. On the other hand, Shri Nagvenkar, the learned APP, has submitted that section 51 of the NDPS Act empowers the Trial Court to permit reweighing. According to him, ascertaining the net weight of the contraband is an aspect of seizure. He, nevertheless, insists that the NDPS Act does not prohibit re-ascertaining of the contraband weight. In this context, the learned APP has also drawn my attention to section 173 (8) of the Cr.P.C., which permits further investigation.

Discussion:

8. The petitioner faces an allegation that he had been found possessing (i) 110.820 grams of white coloured crystalline powder substance suspected to be cocaine; (ii) 101.108 grams of white coloured mixtures of crystals and powder substance suspected to be MDMA; and (iii) 240 grams of pieces of blackish colour sticky substance suspected to be charas. Before samples of these substances were sent for chemical analysis, the ANC had it weighed before the Magistrate. But, then, it weighed them along with the polythene sachets in which they were found. The inventory proceedings, dated 14.01.2020, relating to the drawing of samples and certification before the Executive Magistrate clearly reflect this.

9. Let us check the statutory scheme and the precedential position. In *Thana Singh*, the Supreme Court prefaces its reasoning

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2 2015 ALL MR (Cri) 1665

3 (2016) 3 SCC 379

with a poignant observation that "the laxity with which we throw citizens into prison reflects our lack of appreciation for the tribulations of incarceration; the callousness with which we leave them there reflects our lack of deference for humanity." According to *Thana Singh*, it also reflects our imprudence when our prisons are bursting at their seams. For the prisoner himself, imprisonment for the purposes of the trial is as ignoble as imprisonment on conviction for an offence, since the damning finger and opprobrious eyes of society draw no difference between the two. Continuing in the same vein, *Thana Singh* further observes that "the plight of the undertrial seems to gain focus only on a solicitous inquiry by this Court, and soon after, quickly fades into the backdrop."

10. The facts of *Thana Singh* reveal that charged with an offence under the NDPS Act, the appellant had been languishing in prison for over 12 years, awaiting the trial. His request for bail had been consistently denied. For the offence carrying a maximum sentence of 20 years, the appellant had remained in detention for over half of that maximum period of imprisonment. In this context, *Thana Singh* has made the above observations. That apart, under the caption "Retesting Provisions", *Thana Singh* notes that the NDPS Act itself does not permit resampling or retesting of samples. Yet, there has been a trend to the contrary. NDPS courts have been consistently obliging applications for retesting and resampling. These applications add to delays as they are often received at advanced stages of trials after a significant lapse of time. NDPS courts seem to be permitting retesting, nonetheless, by taking resort to certain judicial pronouncements.

11. *Thana Singh* agrees that retesting may be an important right of an accused. But it disapproves of the manner in which the right is imported from other legislations without its accompanying restrictions. Under the NDPS Act, retesting and resampling are 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 retesting.

12. Then, *Thana Singh* points out to the imperative to define retesting rights, if at all, as an amalgamation of the above-stated factors. According to it, section 52A of the NDPS Act permits swift disposal of some hazardous substances; but the time frame within which any application for retesting may be permitted ought to be strictly defined and followed.

13. Keeping in mind the array of factors as discussed above, *Thana Singh* has directed that "any requests as to retesting/resampling 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 retesting/resampling shall be entertained thereafter".

However, in the absence of any compelling circumstances, any form of retesting/resampling is strictly prohibited under the NDPS Act.

14. In *Union of India v. Mohan Lal*, the issue concerns the procedure to be followed for seizure, sampling, safekeeping, and disposal of the seized Drugs, Narcotics and Psychotropic substances. The Apex Court, *prima facie*, concluded that the procedure prescribed for the destruction of the contraband seized in different States was not being followed. And it has resulted in a very piquant situation: the accumulation of huge quantities of the seized drugs and narcotics, increasing manifold the chances of their pilferage for re-circulation in the market.

15. So, *Mohanlal* has referred to sections 52A and 53 of the Act and has held that once the seizure is effected and the contraband forwarded to the officer in charge of the Police Station or the officer empowered, the officer concerned is, in law, duty-bound to approach the Magistrate and ask, among other things, for permission to draw representative samples in his presence. Those samples will then be enlisted and the correctness of the list of samples so drawn certified by the Magistrate. In other words, the process of drawing the samples has to be in the presence and under the supervision of the Magistrate. And the entire exercise has to be certified by him to be correct.

16. Then, *Mohanlal* emphasises that the scheme of the NDPS Act in general and Section 52-A, in particular does not brook any delay in the matter of making an application or drawing samples and certifying. While the Court saw no room for prescribing or reading a time frame into the provision, it reckoned that an application for sampling and certification ought to be made without undue delay, and

the Magistrate on receipt of any such application is expected to attend to the application and do whatever is necessary without any undue delay or procrastination, as is mandated by Sub-section (3) of Section 52A. The Supreme Court wanted the High Courts to keep a close watch on the Magistrates' performance in this regard. It also wanted the vigil exercised through the Magistrates on the agencies dealing with the drug menace.

17. In *Shailesh Kanada* if we notice the facts, it emerges that the police registered a crime on the claim that the contraband involved was Methaqualone. The substance was identified with the help of the Field-Testing Kit. Later, samples were sent to the Deputy Chief Chemist, who indicated that 'for exact identification of the sample, more instrumental analysis by I.R. Spectroscopy was required. But that was unavailable with the Dy. Chief Chemist's Office. So the sample was forwarded to the CFSL, Hyderabad. Yet the reports could not be obtained "till the time of filing of the complaint". The complaint also mentions that even the Court had written a letter to the CFSL for speedy dispatch of the Test Report but to no avail.

18. When the Trial Court wanted to take cognisance of the matter, the accused contended that in the absence of the CFSL report, there was no *prima facie* case against the applicants and the other accused. He pleaded for discharge. The prosecution, on the other hand, tried to counter that argument by asserting that the report of the Field-Testing Kit indicated the substances seized to be Methaqualone. And that this was 'sufficient for taking cognisance of the alleged offence'. The trial Court, inter alia, observed that at the stage of its taking of cognisance, it could consider the report of Field-Testing Kit. So, it has accepted the prosecution's counter plea.

19. Eventually, the CFL report was filed. That report revealed that of three samples, one was Ketamine and the other two were Methamphetamine. None contained Methaqualone. Again, the accused pleaded for discharge. Before the High Court, in an application under section 482 of Cr PC for quashing, the accused contended that after receipt of the Dy. CC report, the police sending samples to CFSL Hyderabad without the Trial Court's permission is per se illegal.

20. Then, this Court in *Shailesh Kanada* has held that the act of sending the samples for retesting to the CFSL, Hyderabad, without the prosecution's obtaining permission or order from the Trial Court was illegal and not warranted by law. Thus, based on this and other "glaring and manifest defects", this Court quashed the criminal proceedings.

The Issue in Perspective:

21. Let us pause for a moment here and question ourselves whether any of these three decisions—*Thana Singh* and *Mohanlal* from the Supreme Court and *Shailesh Kanada* from this Court—helps the petitioner's cause.

22. *Thana Singh*, first, decried the procedural delays and commiserated with the suspects languishing in jails for long periods. Second, it has emphasised the need for retesting as an "important right of an accused". It has, however, deplored the haphazard manner in which the retesting and the resampling is being resorted to. It is said to be contrary to legislation and without any specific time-frame. So, in the end, *Thana Singh* has directed that "any requests as to retesting/resampling shall not be entertained under the NDPS Act as a matter of course. These may, however, be permitted, in extremely

exceptional circumstances". It must be for cogent reasons. Besides, the application in such rare cases must be made in fifteen days after the receipt of the test report.

23. In *Mohanlal*, the question concerned the procedure to be followed for seizure, sampling, safekeeping, and disposal of the seized substances. The Supreme has felt that there is a procedural infraction. Then, it has emphasised that the NDPS Act does not brook any delay in the matter of making an application or drawing samples and certifying. And in *Shailesh Kanada*, this Court invalidated the prosecution's sending samples for retesting to the CFSL without its obtaining permission or order from the Trial Court.

24. Indeed, all the above three decisions deal with retesting or resampling. That is, in those cases the question was about nature of the substance. Inadequate testing resulted in insufficient data to determine the nature of the contraband seized. With these flawed findings, the prosecution oftentimes indulged in retesting and resampling. And that was without the Trial Court's leave. This practice was held to be wrong. Especially in *Thana Singh*, the Supreme Court has issued guidelines. One of the guidelines is that the retesting or resampling may be permitted only under extremely exceptional circumstances. And any application for that purpose must be in fifteen days after the receipt of the test report.

25. Here, the controversy concerns neither retesting nor resampling. The seized contraband was subjected to chemical analysis, and the CFSL report has already been on record. No questions on it. But the dispute relates to the quantity of the contraband: is it a commercial, variable, or small quantity. The suspect's bail entitlement and the eventual quantum of a sentence depend on this finding. When

the police had the substance weighed, they did follow the procedure. But they weighed the whole substance—including the polythene covers in which the contraband was packed. Minor may be the weight of the cover, but that affects the total weight of the substance. What the law requires is the net weight.

26. Belated retesting or resampling does prejudice the accused's interest. A long lapse of time may alter the chemical composition or cause natural decay, again, affecting the substance quality. So timely testing or resampling is a *sine qua non*. Once the substance has been chemically characterised, the weight is a matter of arithmetic. The recalibration of weight, by excluding the cover in which the substance is found, only helps the Trial Court to know the net weight. And that determination helps it to decide whether the accused is entitled to bail. Besides, in the end, if the prosecution brings home the accused's guilt, the accurate weight of the substance also helps the Trial Court in fixing the quantum of punishment, too. It may, thus, enure to the accused's benefit. On this technicality, we cannot permit the scuttling of the substantial cause of justice. It does not, after all, want to throw the baby out with the bathwater.

27. I, therefore, hold that the Trial Court's impugned order, dt.23.09.2020, suffers from no legal infirmities.

Result:

I dismiss the Criminal Writ Petition—no order on costs.

DAMA SESHADRI NAIDU, J.

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