

**IN THE HIGH COURT OF MADHYA PRADESH  
AT GWALIOR**

**BEFORE**

**HON'BLE SHRI JUSTICE ANAND PATHAK**

**MISC. CRIMINAL CASE No. 23773 of 2023**

**BETWEEN:-**

**THE STATE OF MADHYA PRADESH STATION  
HOUSE OFFICER THROUGH POLICE STATION  
MORAR (MADHYA PRADESH)**

**.....APPLICANT**

***(BY SHRI M.P.S. RAGHUWANSHI – LEARNED SENIOR  
ADVOCATE/ADDITIONAL ADVOCATE GENERAL WITH RAVINDRA SINGH  
KUSHWAHA – DEPUTY ADVOCATE GENERAL)***

**AND**

- 1. SONAM W/O SHRI SATENDRA RAJPOOT R/O  
BHANDER DISTRICT DATIA (MADHYA  
PRADESH)**
- 2. SURENDRA S/O SHRI MADHAV SINGH  
DANGI SHIVBIHAR COLONY, UNNAO ROAD,  
DISTRICT DATIA (MADHYA PRADESH)**
- 3. HRIDESH KUSHWAH S/O LATE SHRI  
BHAWANI SHANKAR KUSHWAH DAATRE KI  
NARIYA, ASHUMAI GALI, DISTRICT DATIA  
(MADHYA PRADESH)**
- 4. MOHIT TIWARI S/O SHRI SHANKAR DAYAL  
TIWARI NEAR GANJI KE HANUMAN,  
UNNAO ROAD, DISTRICT DATIA (MADHYA  
PRADESH)**
- 5. SUNIL @ RAHUL PARIHAR S/O SHRI  
RAJEEV PARIHAR DONIYAPURA, GORMI,  
DISTRICT BHIND (MADHYA PRADESH)**
- 6. MUKESH DANGI S/O SHRI RAMMILAN  
DANGI VILLAGE RAO, DISTRICT DATIA  
(MADHYA PRADESH)**
- 7. OMPRAKASH BATHAM S/O SHRI**

RAMRATAN BATHAM NEAR GOVT. TOILET,  
RAMTAPURA, DISTRICT GWALIOR  
(MADHYA PRADESH)

8. MANISH MISHRA S/O SHRI BRIJKISHORE  
MISHRA VILLAGE TORIYAPURA PAHADI  
CHUNGI CHIRGAON (UTTAR PRADESH)

.....RESPONDENTS

(BY SHRI ARUN SHARMA – ADVOCATE FOR RESPONDENT NO.2)

(BY SHRI RAVI VALLABH TRIPATHI – ADVOCATE FOR RESPONDENT  
NO.1

(BY SHRI SUSHIL GOSWAMI – ADVOCATE FOR RESPONDENTS NO.3, 4  
AND 8)

(BY SHRI C.P. SINGH – ADVOCATE FOR RESPONDENT NO.6)

(BY SHRI PALLAV TRIPATHI – ADVOCATE FOR RESPONDENT NO.7)

(NONE PRESENT FOR RESPONDENT NO.5)

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Reserved on : 06/09/2023

Pronounced on : 13/09/2023

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*This petition having been heard and reserved for order coming on  
for pronouncement this day, this Court passed the following:*

### **ORDER**

With consent heard finally.

1. The present petition is preferred under Section 482 of Cr.P.C. preferred at the instance of State through Station House Officer, Police Station Morar, District Gwalior being crestfallen by order dated 19.05.2023 passed by Special Judge (NDPS) Gwalior whereby application preferred by petitioner for Retesting has been rejected.
2. Precisely stated facts of the case are that on 06.09.2022, based upon some secret information received by the police, a trap was laid and

720 grams of Methylenedioxy-Methamphetamine (M.D.M.A) was seized from seven accused persons as eighth accused person absconded and was arrested later on. Rest of the accused (seven in number) were arrested on the spot. From their respective possession, different quantity of M.D.M.A. was recovered. Separate samples of 5 grams of each were prepared (two samples, one original A-1; another duplicate sample A-2) were taken and FIR was registered vide Crime No. 760 of 2022 under Section 8/22 of NDPS Act and Sections 25 and 27 of Arms Act. After sampling was completed, samples were sent for chemical examination to the Regional Forensic Science Laboratory, Bhopal on 16.09.2022. It appears that report was prepared on 21.10.2022 but same was not transmitted to the police authority and ultimately, as submitted, said report was received (along with covering letter dated 11.04.2023) on 19.04.2023 at Gwalior.

3. The said report indicates that the examination of sample revealed detection of Uria substance and no M.D.M.A. drug was found in the sample.

4. Meanwhile, bail application was preferred by respondent No.4/accused person Mohit Tiwari vide MCRC No.14202/2023 and Co-ordinate Bench of this Court, vide order dated 20.04.2023 allowed the bail application preferred by said accused and on the basis of chemical examination report dated 11.04.2023 allowed the bail application and directed to grant compensation to accused persons of Rs. 10,00,000/- for his wrongful confinement. Said order is challenged by way of Writ Appeal 692/2023 and vide order dated 10.05.2023 grant of compensation

and observations against the police officers stand stayed.

5. Thereafter, on 06.01.2023, in presence of Executive Magistrate (Tehsildar, Gwalior) resampling was done and some samples were taken from the already kept stock with the police purportedly to satisfy the provisions of Section 52-A N.D.P.S. of the Act. Said samples are still lying with Malkhana of Police Station.

6. Thereafter, an application for retesting was filed by the petitioner/State on 02.05.2023. Said application stood rejected on 19.05.2023 by trial court. Therefore, State is before this Court by preferring petition under Section 482 of Cr.P.C.

7. It is the submission of learned Senior Counsel appearing for the petitioner/State that charge-sheet is filed in the case and charges are not framed yet. Application is filed within 15 days as stipulated by Apex Court in the of **Thana Singh Vs. Central Bureau of Narcotics** reported in **(2013) 2 SCC 590** and submits that application is within time. No malafide action is being alleged against any police officer and reply has not been filed by the respondents to the application preferred by the petitioner. Even otherwise, no prejudice would be caused to the accused if the application is allowed because the report, according to the petitioner is doubtful. Report was prepared on 21.10.2022 but dispatched on 11.04.2023 which was received by the police on 19.04.2023. Therefore, it can be inferred that foul play occurred midway and therefore, inquiry has been instituted by the Inspector General, Gwalior Zone vide order dated 02.05.2023. He also relied upon the order dated 05.01.2023 passed by Coordinate Bench in Criminal Revision No.2360/2022.

8. It is further submitted that it defies common sense that seven people will carry 720 grams of urea in their pockets. When they were duly searched as per the provisions of NDPS Act and thereafter, drugs were found in their possession. Therefore, it was not urea which was found in possession of accused, but it was M.D.M.A..

9. *Per contra* learned counsel for the respondents advanced arguments in tandem.

10. According to the learned counsel for respondents, since as per Section 52A of the Act, storage of drugs lies with the police, therefore, manipulation cannot be ruled out and in fact no manipulation can be done at the instance of accused persons. Report was published well on 21.10.2023 and which was well within the knowledge of petitioner/State but just to take the case of retesting within the limitation, report was purportedly shown to be received on 19.04.2023.

11. It is further submitted that accused persons were falsely implicated in the case and they were picked up from different spots of city and collectively implicated for alleged commission of offences. According to them, when samples A, A1 and A2 (original and duplicate respectively) were taken earlier by the police then no requirement of samples existed on 06.11.2023 in presence of Tahsildar who is at best Executive Magistrate and not Judicial Magistrate First Class. He relied in the case of **Union of India Vs. Mohanlal and another** reported in **2016 (3) SCC 379** and notification dated 23.12.2022 issued by the Ministry of Finance (Department of Revenue).

12. Learned counsel for the respondents referred notification dated

23.12.2022 to submit that in present case, appropriate Magistrate is Judicial Magistrate in front of whom such sampling ought to have been done. It is further submitted that some samples were taken by the police like A, A1 and A2 and so on till G1 and G2. Therefore, from the sample A2 retesting could have been done but here it appears that petitioner has manipulated the samples in such a manner where they will get report of their choice, therefore, they prayed for dismissal of this petition.

13. Respondents also referred the fact that appropriate applications have been filed by the accused persons for preserving call details record (CDR) of mobiles of accused so that their real time location at the time of their arrest can be ascertained.

14. Heard the learned counsel for the parties at length and perused the documents appended thereto.

15. This is a case where petitioner is the State of M.P. and filed petition through Station House Officer, Police Station- Morar, District Gwalior who has approached this Court with the prayer to send the samples for retesting. Thus, petitioner has taken exception to the order dated 19.05.2023 passed by the Special Judge (NDPS Act), Gwalior, whereby application for retesting was rejected.

16. Narcotics Drugs and Psychotropic Substance Act 1985 was enacted with a view to make stringent provisions for the control and regulation of operation relating to Narcotics Drugs and Psychotropic Substances. Object of Act as reflected in statement of aims and object is reiterated as under:-

#### **STATEMENT OF OBJECTS AND REASONS**

1. *The statutory control over narcotic drugs is exercised in India through a number of Central and State enactments. The principal Central Acts, namely the Opium Act, 1857, the Opium Act, 1878 and the Dangerous Drugs Act, 1930 were enacted a long time ago. With the passage of time and the developments in the field of illicit drug traffic and drug abuse at national and international level, many deficiencies in the existing laws have come to notice, some of which are indicated below:-*

- (i) The scheme of penalties under the present Acts is not sufficiently deterrent to meet the challenge of well organized gangs of smugglers. The Dangerous Drugs Act, 1930 provides for a maximum term of imprisonment of 3 years with or without fine and 4 years imprisonment with or without fine for repeat offences. Further, no minimum punishment is prescribed in the present laws, as a result of which drug traffickers have been some times let off by the courts with nominal punishment. The country has for the last few years been increasingly facing the problem of transit traffic of drugs coming mainly from some of our neighboring countries and destined mainly to Western countries.*
- (ii) The existing Central laws do not provide for investing the officers of a number of important Central enforcement agencies like Narcotics, Customs, Central Excise, etc., with the power of investigation of offences*

*under the said laws.*

*(iii) Since the enactment of the aforesaid three Central Acts a vast body of international law in the field of narcotics control has evolved through various international treaties ties and protocols. The Government of India has been a party to these treaties and conventions which entail several obligations which are not covered or are only partly covered by the present Acts.*

*(iv) During recent years new drugs of addiction which have come to be known as psychotropic substances have appeared on the scene and posed serious problems to national government. There is no comprehensive law to enable exercise of control over psychotropic substances in India in the manner as envisaged in the Convention on Psychotropic Substances, 1971 to which India has also acceded'*

*2. In view of what has been stated above, there is an urgent need for the enactment of a comprehensive legislation on narcotic drugs and psychotropics substances which, inter-alia, should consolidate and amend the existing laws relating to narcotic drugs, strengthen the existing controls over drugs abuse, considerably enhance the penalties particularly for trafficking offences, make provisions for exercising effective control over psychotropic substances and make provisions for the implementation of international conventions relating to narcotic drugs and psychotropic substances to which India has*



*become a party'.*

17. Similarly Aim of the Act is defined in the preamble of the Act which is as under :-

*“An Act to consolidate and amend the law relating to narcotic drugs, to make stringent provisions for the control and regulation of operations relating to the narcotic drugs and psychotropic substances [,to provide for the forfeiture of property derived from, or used in, illicit traffic in narcotic drugs and psychotropic substances, to implement the provisions of the International Convention on Narcotic Drugs and Psychotropic Substances] and for matters connected therewith.”*

18. Perusal of Aims and Object reveals that it is meant to tackle the menace of illicit traffic in Narcotics Drugs and Psychotropic Substances with some other high aims and objects. So far as law relating to retesting of samples is concerned, it appears that there is no statutory provisions exist as such but this concept is considered by the Hon'ble Supreme Court in the case of **Thana Singh Vs. Central Bureau of Narcotics, (2003) 2 SCC 590**. In the said case, certain directions and guidelines were given by the Apex Court in respect of manner in which trials of NDPS Act are to be proceeded. Said directions were in following respects.

– **Directions:-**

- A- Adjournments
- B- Examination of witnesses

- C- Workload
- D- Narcotics Laboratories
- E- Personnel
- F- **Retesting Provisions**
- G- Monitoring
- H- Public Prosecutors

19. In the realm of retesting provisions, Apex Court while considering the statutory position where Narcotics Drugs and Psychotropic Substances Act does not permit for re-sampling or retesting of samples, yet explained the concept in following manner:-

*“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 and 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 52A 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 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.*

**20.** Therefore, it is abundantly clear that in extremely exceptional circumstances, for cogent reasons to be recorded, application for retesting can be considered provided application is filed within a period of 15 days of the receipt of the test report.

Therefore, first aspect needs to be considered is limitation because if application is not preferred within 15 days then further discussion would appear to be meaningless because this is the law declared by the

Apex Court under Article 141/32 of the Constitution of the India.

**21.** Here in the present case, testing report was received by the police on 19.04.2023 and as per the petitioner, they applied for retesting on 02.05.2023. In the said application for retesting filed before the trial court it has been specifically averred that the report has been received on 19.04.2023 and same appears to be *prima facie* correct because the report is dispatched on 11.04.2023 (wrongly mentioned as 11.04.2022 on top of the letter), therefore, it might have reached Bhopal to Gwalior on 19.04.2023.

**22.** Respondents did not file any reply to the said application before the trial court and could not produce any other document to demonstrate that report was received by them prior to 19.04.2023, therefore, it is to be assumed *prima facie* for this purpose that report of samples was received on 19.04.2023 and application was moved on 02.05.2023, therefore, application is within limitation as per mandate of Apex Court.

**23.** Since exceptionality of circumstances is concerned, from the discussion, it appears that at the time of seizure, 3 samples were taken like A, A1 and A2 in which A was original sample and A1 and A2 are the duplicate samples. They were kept in Malkhana of Police Station. From the original samples A, B, C, D, E, F, and G and duplicate samples A1 to G1 and A2 to G2 in which samples A1 to G1 were sent for examination and samples A2 to G2 are still lying with the police in Malkhana. Therefore, apprehension of respondents can be ruled out by picking up the samples from A2 to G2 for sending it for retesting, if exceptionality of circumstances justify so.

**24.** As per allegations of respondents, all accused persons were arrested illegally from different areas of the city and they were shown to be arrested with drugs in their possession from the place referred in the charge-sheet. Since this is fact needs to be unfolded during the trial, therefore, at this stage no observation can be made regarding this.

**25.** Possibility cannot be ruled out that after taking the samples from accused persons in respect of MDMA and sent to the Central Forensic Science Laboratory, during transit or at Lab, some mischief might have been caused by someone, either at the instance of accused persons or as part of departmental rivalry or other extraneous considerations. Examination report was prepared on 21.10.2022 but it was sent to the police on 11.04.2023. This delay is inexplicable. Besides that, it is highly improbable that all accused persons were carrying total 720 grams of Urea in their pockets because report indicates that it was Urea and if the drugs was not MDMA which was found in possession of respondents / accused persons, then why they carried Urea in such small quantity surreptitiously. It defies common sense.

**26.** Respondents/accused persons have nowhere alleged malafide against any police officer, therefore, it is not the case where any police officer wanted to implicate them on the pretext or the other. To bring the truth to the fore, Additional Director General of Police/Inspector General of Police, Gwalior Zone, Gwalior vide order dated 02.05.2023 appointed Additional Superintendent of Police (Central) District Gwalior to enquire into the matter and submit report accordingly. The said order is placed with the petition by the petitioner. Enquiry is still going on.

27. One more aspect deserves consideration is that order of retesting may not cause any prejudice to the accused persons but its refusal may (or may not) cast shadow over the case of prosecution. On the other hand, if retesting is done, further clarity would prevail. If testing of samples reveal otherwise then also accused persons would certainly have an opportunity to raise all their grounds/defence before the trial court alongwith the plea of *alibi* as tried to be projected by them during course of arguments. For that, accused persons may move appropriate application before the trial court for preservation of electronic records/call detail records which would certainly be considered by the trial court in accordance with law and in the interest of justice. Therefore, accused persons would always have several defence to their quiver. Therefore, balancing the equity specially in juxtaposition to the aims and object of the NDPS Act persuade this Court to allow this petition for sending the samples for retesting.

28. One more aspect deserves consideration is that in NDPS Act certain presumptions are being raised against accused. Sections 35, 54, and 66 of the Act are worth consideration in this regard.

**Sections 35 – Presumption of culpable mental state.**

**Section 54 – Presumption from possession of illicit articles.**

**Section 66 – Presumption as to documents in certain case.**

Presumption as a rule of evidence has been discussed by the Apex Court in the case of **Noor Aga Vs. State of Punjab and another** reported in (2008) 16 SCC 417 and **Gopal Krishna Gautam Vs. Union of India** reported in 2021 (3) MPLJ (Cri.) 210. Although they are rebuttal presumptions, but reflect the Legislative Intent. Therefore, on this count



also, a chance deserves to be given to the police for Retesting.

**29.** Another exigency which persuades this Court is that trial is at the initial stage and as submitted, charges are not framed yet, therefore, all the parties would have a level playing field.

**30.** So far as the apprehension of the respondents that samples may be mixed up by police and while referring so, they refer the proceedings dated 06.01.2023 which is a document filed with the charge-sheet which reveals that samples were taken on 06.01.2023 in the presence of Executive Magistrate but not in presence of Judicial Magistrate First Class, as per notification dated 23.12.2022 would be safeguarded. For that, it is hereby clarified that samples which were taken from Executive Magistrate on 06.01.2023 would not be sent for retesting. It would be the **duplicate samples - A2 to G2** would only be sent as samples for Retesting. In other words, samples which were earlier taken by the petitioner as A2, B2, C2, D2, E2, F2, G2 would only be sent for Retesting before any Central Laboratory outside the State and report shall be requisitioned as early as possible. Proper procedural compliance/safeguards would be undertaken by police.

**31.** Consequently, this petition under Section 482 of the Cr.P.C. preferred by the State is **allowed** and impugned order dated 19.05.2023 is hereby set aside. Samples A2 to G2 as referred above under the guidance of Special Judge (NDPS Act) and in presence of his representatives/Commissioner, samples be taken out from the Malkhana of Police Station and be sent for Retesting at any Central Laboratory. Due precaution be taken so that apprehension of tampering by accused persons

be ruled out. Report of Retesting be submitted henceforth. Accused persons may set at liberty to move appropriate application for preservation of call detail records before the trial court which shall be considered at an expeditious note in accordance with law.

**32.** With the aforesaid directions, the present **petition stands allowed and disposed of.**

**33.** It is made clear that trial Court shall not be influenced by any observation of this court and would decide the case on its own merits.

**(ANAND PATHAK)**  
**JUDGE**

Rashid