

(2018) 08 SC CK 0033

Supreme Court Of India

Case No: CRIMINAL APPEAL NO.1880 OF 2011

Mohan Lal

APPELLANT

Vs

State Of Punjab

RESPONDENT

Date of Decision: Aug. 16, 2018

Acts Referred:

- Constitution of India, 1950 - Article 21
- Indian Penal Code, 1860 - Section 165A, 304B
- Narcotic Drugs and Psychotropic Substances Act, 1985 - Section 18, 35, 35(2), 37, 54, 55
- Code of Criminal Procedure, 1973 - Section 313

Citation: (2018) 8 JT 53 : (2018) 9 Scale 663 : (2018) 3 Crimes 218 : (2018) 3 JKJ 3 : (2018) 3 JLJR 393 : (2018) 4 MLJ (Cri) 244 : (2018) 2 OLR 485 : (2018) 3 PLJR 419 : (2018) 4 RCR(Criminal) 101 : AIR 2018 SC 3853 : (2018) 9 SCR 1006 : (2018) 17 SCC 627

Hon'ble Judges: RANJAN GOGOI, J; R. BANUMATHI, J; NAVIN SINHA, J

Bench: Full Bench

Advocate: Jaspreet Gogia, Chanchal Kumar Ganguli

Final Decision: Allowed

Judgement

NAVIN SINHA, J.

The appellant assails his conviction under Section 18 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred as "the

NDPS Act"), sentencing him to rigorous imprisonment for 10 years and a fine of Rs.1,00,000/- (Rupees one lakh only), with a default stipulation.

2. An F.I.R. was lodged on 03.02.1997 by PW-1, Chand Singh, Sub-Inspector of Balianwali Police Station, that while on patrol duty, he was

accompanied by Darshan Singh, Sarpanch and Assistant Sub-Inspector Balwinder Singh. The witness entertained doubts about the appellant upon

seeing him. PW-4, Shri Rajinder N. Dhoke, IPS, a gazetted officer, was called and the appellant was searched, leading to recovery of 4 kg of opium

in a bag carried by him. The consent memo, Exhibit PB was signed by Darshan Singh and PW-1. The seized opium was separated into a sample of

20 gm. and 3kg 980 gm. The specimen seal was prepared by PW-1 and after use, the seal was handed over to ASI, Balwinder Singh. A Ruqa

was prepared by PW-1 and forwarded to Balianwali Police Station. PW-3, Assistant Sub-Inspector, Darshan Singh registered the formal F.I.R.

and handed over investigation to PW-1. Upon conclusion of investigation, the appellant was charge-sheeted, put on trial, and convicted.

3. Sh. Chanchal Kumar Ganguli, learned counsel for the appellant submitted that the NDPS Act being a stringent law carrying a reverse burden of

proof, there had to be strict adherence to the law and procedures. The investigation was not only required to be fair and judicious, but must also

appear to have been so. The investigation ought not to be in a manner leaving a genuine apprehension in the mind of the accused that it was not fair

and bonafide. No reasons have been furnished why Darshan Singh and ASI Balwinder Singh have not been examined by the prosecution. No

explanation has been furnished by PW-1 why he did not deposit the seized narcotics in the malkhana. Likewise, the delay of 9 days in sending the

sample for chemical analysis also remains unexplained. The investigation was fundamentally flawed. PW-1, being the informant, he could not have

been the investigating officer himself. Reliance was placed on Bhagwan Singh vs. State of Rajasthan, (1976) 1 SCC 15, Megha Singh vs. State of

Haryana, 1996 (11) SCC 709, State by Inspector of Police, Narcotics Intelligence Bureau, Madurai, Tamilnadu vs. Rajangam, 2010 (15) SCC 369.

4. Ms. Jaspreet Gogia, learned counsel for the respondent contended that the appellant was searched in presence of a Gazetted Officer, PW-4. The

failure to examine Darshan Singh or ASI Balwinder Singh was inconsequential as the search and recovery were duly proved by PW-1 and PW-4.

Merely because they were police officers, their evidence does not stand vitiated. There shall be a presumption that official duties were regularly

performed. The burden of proof for innocence lay upon the accused in view of the statutory presumption under Sections 35 and 54 of the NDPS Act,

which he failed to discharge. The investigation was not vitiated because PWÂ1 may have been the informant himself. Reliance was placed on State

of Punjab vs. Baldev Singh, (1999) 6 SCC 172, Bhaskar Ramappa Madar & Ors. vs. State of Karnataka, (2009)11 SCC 690, Surender vs. State of

Haryana, (2016) 4 SCC 617.

5. We have considered the submissions on behalf of the parties. The primary question for our consideration in the present appeal is, whether in a

criminal prosecution, it will be in consonance with the principles of justice, fair play and a fair investigation, if the informant and the investigating

officer were to be the same person. In such a case, is it necessary for the accused to demonstrate prejudice, especially under laws such as NDPS

Act, carrying a reverse burden of proof.

6. Darshan Singh was an illiterate person. He is stated to have been accompanying PWÂ1 in a police vehicle while on official duty along with ASI

Balwinder Singh. This to our mind, is certainly not in the normal course of events. The consent memo ExhibitÂPB was stated to have been signed by

Darshan Singh, despite his being an illiterate, along with PWÂ1. The seal sample was prepared by PWÂ1, and signed by Darshan Singh and ASI

Balwinder Singh. The seal was then handed over to ASI Balwinder Singh. The case property was retained by PWÂ1 in his possession and was not

deposited in the malkhana nor entered in the roznamcha. There is no explanation for the same. The sample was retained by PWÂ1 in his private

custody in a rented accommodation. No explanation is forthcoming from the prosecution why Darshan Singh, and ASI Balwinder Singh were not

examined despite service of summons on the official witness and issuance of bailable warrants against the private witness. In their absence, neither

the consent memo nor the seal can be stated to have been proved. There was nine daysâ€™ delay in sending the sample for chemical analysis. No

explanation has been furnished in respect of the same. PWÂ4 acknowledged that the recovery memo, ExhibitÂPC was not signed by the accused and

that copies of documents were not supplied to the accused nor any memo in this regard prepared in his presence. ExhibitÂPB, the consent memo only

mentioned that he was the ASP, Phul.

7. The presence of a private person in a police vehicle while on patrol duty, the individual being an illiterate, but having signed the consent memo were

surely matters for investigation. Similarly, why the signature of ASI Balwinder Singh or PWÂ4 was not obtained on the consent memo was again a

subject matter of investigation. The veracity of the sample seal handed over to ASI Balwinder Singh was likewise a matter for investigation as to

whether it was the same as the seal on the case property retained in his private custody by PWÂ1 and that sent for chemical analysis. The mere fact

that there may have been a seal cannot lead to any presumption in absence of the examination of ASI Balwinder Singh. Likewise, it was also a

subject of investigation why PWÂ1 did not make any roznamcha entry of the seized property and the reason why he retained the case property and

sample in his private custody in a rented house despite the availability of a malkhana. The delay in sending the sample for chemical analysis, in the

facts and circumstances of the case was again a matter for investigation. Had the investigator been different from the complainant, the issues for

consideration may have been entirely different. The appellant in his defence under Section 313 Cr.P.C. had specifically taken a plea of false

implication by PWÂ1 on account of a dispute with regard to purchase of a tractor.

8. The view taken by the High Court that under Section 55 of the NDPS Act, that PWÂ1 was empowered to keep the case property and sample in

his individual safe custody is completely erroneous on the face of it. The provision reads as follows:

â€œ55. Police to take charge of articles seized and deliveredâ€ An officerâ€inâ€charge of a police station shall take charge of and keep in safe

custody, pending the orders of the Magistrate, all articles seized under this Act within the local area of that police station and which may be delivered

to him, and shall allow any officer who may accompany such articles to the police station or who may be deputed for the purpose, to affix his seal to

such articles or to take samples of and from them and all samples so taken shall also be sealed with a seal of the officerâ€inâ€charge of the police

station.â€(emphasis added)

A plain reading of the provision makes it manifest that it is the duty of the police officer to deposit the seized material in the police station malkhana.

9. Standing Order No. 1 of 88 issued by the Narcotics Control Bureau in clause 1.13 reads as follows:

“Mode and time limit for dispatch of sample to Laboratory.

The samples should be sent either by insured post or through special messenger duly authorised for the purpose. Dispatch of samples

by registered post or ordinary mail should not be resorted to. Samples must be dispatched to the Laboratory within 72 hours of seizure to avoid any

legal objection.”(emphasis added)

The Drug Law Enforcement Field Officer’s Hand Book issued by the Narcotics Control Bureau also provides that:

“28. Were the seized goods and samples deposited in the Malkhana at the earliest opportunity after seizure, an acknowledgement receipt obtained

from the Malkhana in Charge? (emphasis added)

29. Were the samples sent to the designated laboratory for analysis and report within 72 hours of seizure?”

In Noor Aga vs. State of Punjab, (2008) 16 SCC 417, under the NDPS Act, it was held :

“91. The logical corollary of these discussions is that the guidelines such as those present in the Standing Order cannot be blatantly flouted and

substantial compliance therewith must be insisted upon for so that sanctity of physical evidence in such cases remains intact. Clearly, there has been

no substantial compliance with these guidelines by the investigating authority which leads to drawing of an adverse inference against them to the

effect that had such evidence been produced, the same would have gone against the prosecution.”

10. Unlike the general principle of criminal jurisprudence that an accused is presumed innocent unless proved guilty, the NDPS Act carries a reverse

burden of proof under Sections 35 and 54. But that cannot be understood to mean that the moment an allegation is made and the F.I.R. recites

compliance with statutory procedures leading to recovery, the burden of proof from the very inception of the prosecution shifts to the accused, without

the prosecution having to establish or prove anything more. The presumption is rebuttable. Section 35 (2) provides that a fact can be said to have been

proved if it is established beyond reasonable doubt and not on preponderance of probability. The stringent provisions of the NDPS Act, such as

Section 37, the minimum sentence of ten years, absence of any provision for remission, do not dispense with the requirement of the prosecution to

establish a prima facie case beyond reasonable doubt after investigation, only after which the burden of proof shall shift to the accused. The case of

the prosecution cannot be allowed to rest on a preponderance of probabilities.

11. A fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in a NDPS

case were not to be fair or raises serious questions about its fairness apparent on the face of the investigation. In the nature of the reverse burden of

proof, the onus will lie on the prosecution to demonstrate on the face of it that the investigation was fair, judicious with no circumstances that may

raise doubts about its veracity. The obligation of proof beyond reasonable doubt will take within its ambit a fair investigation, in absence of which there

can be no fair trial. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger vesting arbitrary

powers in the police which may well lead to false implication also. Investigation in such a case would then become an empty formality and a farce.

Such an interpretation therefore naturally has to be avoided.

12. That investigation in a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on part

of the accused was noticed in *Babubhai vs. State of Gujarat*, (2010) 12 SCC 254 as follows:

“32. The investigation into a criminal offence must be free from objectionable features or infirmities which may legitimately lead to a grievance on

the part of the accused that investigation was unfair and carried out with an ulterior motive. It is also the duty of the investigating officer to conduct

the investigation avoiding any kind of mischief and harassment to any of the accused. The investigating officer should be fair and conscious so as to

rule out any possibility of fabrication of evidence and his impartial conduct must dispel any suspicion as to its genuineness. The investigating officer

“is not merely to bolster up a prosecution case with such evidence as may enable the court to record a conviction but to bring out the real

unvarnished truth.

33. In *State of Bihar v. P.P. Sharma* this Court has held as under:

“57. Investigation is a delicate painstaking and dextrous process. Ethical conduct is absolutely essential for investigative professionalism.”

Therefore, before countenancing such allegations of mala fides or bias it is salutary and an onerous duty and responsibility of the court, not only to

insist upon making specific and definite allegations of personal animosity against the investigating officer at the start of the investigation but also must

insist to establish and prove them from the facts and circumstances to the satisfaction of the court.

* * *

59. Malice in law could be inferred from doing of wrongful act intentionally without any just cause or excuse or without there being reasonable relation

to the purpose of the exercise of statutory power.”

61. An investigating officer who is not sensitive to the constitutional mandates, may be prone to trample upon the personal liberty of a person when he

is actuated by mala fides.”

13. The duty of the prosecution under the NDPS Act, considering the reverse burden of proof, was noticed in *Noor Aga* (supra) observing: “

58” “An initial burden exists upon the prosecution and only when it stands satisfied, would the legal burden shift. Even then, the standard of

proof required for the accused to prove his innocence is not as high as that of the prosecution. Whereas the standard of proof required to prove the

guilt of the accused on the prosecution is “beyond all reasonable doubt” but it is “preponderance of probability” on the accused. If the

prosecution fails to prove the foundational facts so as to attract the rigours of Section 35 of the Act, the actus reus which is possession of contraband

by the accused cannot be said to have been established.

59. With a view to bring within its purview the requirements of Section 54 of the Act, element of possession of the contraband was essential so as to

shift the burden on the accused. The provisions being exceptions to the general rule, the generality thereof would continue to be operative, namely, the

element of possession will have to be proved beyond reasonable doubt.”

Furthermore, the sample not having been deposited in the malkhana, coupled with non-examination of the private witnesses, an adverse inference was drawn therein against the prosecution. This principle has been reiterated in *Bhola Singh vs. State of Punjab*, 2011(11) SCC 653.

14. In a criminal prosecution, there is an obligation cast on the investigator not only to be fair, judicious and just during investigation, but also that the investigation on the very face of it must appear to be so, eschewing any conduct or impression which may give rise to a real and genuine apprehension in the mind of an accused and not mere fanciful, that the investigation was not fair. In the circumstances, if an informant police official in a criminal prosecution, especially when carrying a reverse burden of proof, makes the allegations, is himself asked to investigate, serious doubts will naturally arise with regard to his fairness and impartiality. It is not necessary that bias must actually be proved. It would be illogical to presume and contrary to normal human conduct, that he would himself at the end of the investigation submit a closure report to conclude false implication with all its attendant consequences for the complainant himself. The result of the investigation would therefore be a foregone conclusion.

15. The discussion in the present case may not be understood as confined to the requirements of a fair investigation under the NDPS Act only carrying a reverse burden of proof. *Baldev Singh (supra)* related to a prosecution under Section 165A of the IPC. Nonetheless, it observed that if the informant were to be made the investigating officer, it was bound to reflect on the credibility of the prosecution case. *Megha Singh (supra)* concerned a prosecution under the Terrorist and Disruptive Activities (Prevention) Act, 1985. It was held that the Head Constable being the complainant himself could not have proceeded with the investigation and it was a practice, to say the least, which should not be resorted to so that there may not be any occasion to suspect fair and impartial investigation.

Rajangam (supra) was a prosecution under the NDPS Act, an objection was taken that PW-6 who apprehended the accused could not have investigated the case. Upholding the objection, relying on *Megha Singh (supra)* the accused was acquitted. The view taken by the Madras High Court in *Balasundaran vs. State*, 1999 (113) ELT 785 (Mad.), was also noticed as follows :

16. Learned Counsel for the appellants also stated that P.W. 5 being the Inspector of Police who was present at the time of search and he was the investigating officer and as such it is fatal to the case of the prosecution. P.W. 5, according to the prosecution, was present with PWs 3 and 4 at the time of search. In fact, P.W. 5 alone took up investigation in the case and he had examined the witnesses. No doubt the successor to P.W. 5 alone had filed the charge sheet. But there is no material to show that he had examined any other witness. It therefore follows that P.W. 5 was the person who really investigated the case. P.W. 5 was the person who had searched the appellants in question and he being the investigation officer, certainly it is not proper and correct. The investigation ought to have been done by any other investigating agency. On this score also, the investigation is bound to suffer and as such the entire proceedings will be vitiated.

16. Bhaskar Ramappa Madar (supra) concerned a prosecution under Section 304B, I.P.C. which also carries a reverse burden of proof. The Trial Court held that the investigating officer who was also the complainant could not have investigated, and on that ground, held the prosecution to be tainted. The acquittal was reversed by the High Court. In appeal, this Court declined to interfere with the conviction. After referring to Bhagwan Singh (supra) and Megha Singh (supra), it was observed that the principles laid down therein had to be confined to the facts of the said cases and that the matter would have to be decided on the facts of each case without any universal generalisation.

17. Hardip Singh vs. State of Punjab, 2008 (8) SCC 557 concerned a prosecution under the NDPS Act. The contention was that the Inspector, PW 5 being the complainant himself would be an interested person and should not have been made the investigating officer. The argument was repelled relying on State rep. by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, Tamil Nadu vs. V. Jayapaul, 2004 (5) SCC 223 observing as follows:

‘We find no principle or binding authority to hold that the moment the competent police officer, on the basis of information received, makes out an FIR incorporating his name as the informant, he forfeits his right to investigate. If at all, such investigation could only be assailed on the ground

of bias or real likelihood of bias on the part of the investigating officer. The question of bias would depend on the facts and circumstances of each

case and it is not proper to lay down a broad and unqualified proposition, in the manner in which it has been done by the High Court, that whenever a

police officer proceeds to investigate after registering the FIR on his own, the investigation would necessarily be unfair or biased.â€

Significantly, V. Jayapaul, (supra) related to a prosecution under the Prevention of Corruption Act which sought to distinguish Megha Singh, (supra) on its facts.

18. Baldev Singh, (supra) relied upon by the State is distinguishable on its own facts concerning an irregularity in an investigation by an officer not especially empowered under the NDPS Act to do so.

19. In Surender (supra), the prosecution was under the NDPS Act. There was no independent witness. The objection that PWâ6, Subâinspector

Satbir Singh being the complainant could not have investigated relying on Rajangam, (supra) and Megha Singh, (supra) was rejected on the ground that

he was not the sole person investigating the case, and that the ground had not been raised before the High Court in appeal.

20. In the nature of the controversy, it would be useful to also notice the view taken by different High Courts on the issue. In State of Himachal

Pradesh vs. Atul Sharma 2015 (2) shimLC 693 (Crl. Appeal No. 246 of 2008, decided on 28.02.2015), under the NDPS Act, it was observed as

follows:

â€œ10.8 In present case it is proved on record that complainant is SI Bahadur Singh as per FIR Ext.PW12/A and it is proved on record that entire

investigation has been conducted by complainant himself and there is no evidence on record in order to prove that investigation was handed over to

some other independent Investigating Officer. It is not the case of prosecution that no other independent Investigating Officer was available to

conduct impartial investigation. We are of the opinion that conducting entire investigation i.e. preparation of seizure memo, site plan, recording

statements of witnesses by complainant himself has caused miscarriage of justice to accused qua fair investigation.â€

21. A similar view has been taken in *Shri Fayas Ali vs. State of Mizoram* Crl. Appeal No. 26 of 2013 (J) dated 19.09.2013, relating to prosecution

under the NDPS Act, by the Gauhati High Court as follows:

“From the evidence of PWs 1 and 4, it is clearly found that the major part of the investigation including the arrest of the accused, preparation of

seizure, taking of sample, examination of the seizure witnesses and examination of the accused person, was completed by the PW1, who was the

informant/complainant in the present case. Therefore, it is clearly found that the investigation, in its true sense, was done by the complainant himself.

In the case of *State by Inspector of Police, Narcotic Intelligence Bureau, Madurai*(supra), the Supreme Court, relying on the decision held in the case

of *Megha Singh* (supra), observed that the investigation is to be done by a person other than the complainant and that the investigation done by the

complainant is bound to suffer and vitiate the entire proceeding.”

22. The Punjab & Haryana High Court in *Gannu and Ors. vs. State of Punjab*, 2017 (3) RCR (criminal) 566 (Crl. Appeal No. 1688ÂSB of 2004 dated

26.05.2017) relating to the NDPS Act, after referring to *Noor Aga*, (supra) and the views of the Calcutta High Court also apart from *Atul Sharma*

(supra), concluded as follows:

“14. Another aspect of the matter is that in sheer violation of the principles of fair and impartial investigation, the complainant and the investigating

officer is the same person, which makes the prosecution case doubtful. In *Laltu Prasad v. State of West Bengal*, 2017(2) R.C.R. (Criminal) 237

(Calcutta) (DB), it was held that the complainant himself acting as the investigating officer violating the principles of fair and impartial investigation is

a practice, to say the least, should not be resorted to and it is a disturbing feature. To the same effect, is a Division Bench judgment of Hon'ble

Himachal Pradesh High Court reported as *State of Himachal Pradesh v. Atul Sharma and others*, 2015 (6) R.C.R. (Criminal) 949, wherein, it has

been held that where the complainant himself conducts investigation, it causes miscarriage of justice to accused qua fair investigation.”

23. A Single Judge of the Kerala High Court in *Naushad vs. State of Kerala*, 2000 (1) KLT 785, relating to the NDPS Act held as follows:

“In a case of this nature, when the complainant himself is a Police Official, the investigation should have been conducted by his top ranking

officer and the final report also ought to have been filed by the higher official. A complainant being a police officer cannot be an Investigating Officer.

For, in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and corroborating, the previous information

recorded under Ss. 154 or 155 Cr.P.C. and previous statement of the witness, being a police officer, complaint recorded, under S. 161 Cr.P.C.

enjoined in S. 145 and 157 of the Indian Evidence Act and proviso of S. 162 Cr.P.C. In the instant case, before me, PW1 is an Assistant Sub

Inspector of Police, and I understand from the Public Prosecutor as well as from the Counsel for the petitioner that the particular Police Station has

got a Sub Inspector of Police. Therefore, in this case, the investigation ought to have been conducted by the Sub Inspector of Police or any other

Police Officer above the rank of PW1. In the instant case, thus an incurable infirmity and flaw have been committed by the prosecution, quite against

the proposition of law. Therefore, on that score itself, the petitioner is entitled to get an order of acquittal. In view of my above conclusion on the

footing of position of law, this is a fit case, which has to be allowed by acquitting the petitioner.

Disapproving of the same, a Division Bench in Kader vs. State of Kerala, 2001 CriLJ 4044, held:

“6. Unlike usual cases under the Criminal Procedure Code, in cases under the NDPS Act, by the time of arrest, main part of investigation will be

completed and duty of the investigating officer is mainly in sending the samples for chemical analysis and other routine work and there is no likelihood

of any prejudice in usual circumstances. Therefore, we are of the opinion that merely because a detecting officer himself is investigating officer or the

officer of the same ranks as that of the detecting officer is investigating the case and files report before the Court will not vitiate the proceedings

under N.D.P.S. act in the absence of proof of specific prejudice to the accused. Therefore, legal position stated in Naushad v. State of Kerala 2000

(1) KLT 785 to the contrary is overruled.”

24. The view taken by the Kerala High Court in Kader (supra) does to meet our approval. It tantamounts to holding that the F.I.R. was a gospel truth, making investigation an empty formality if not a farce. The right of the accused to a fair investigation and fair trial guaranteed under Article 21 of the Constitution will stand negated in that event, with arbitrary and uncanalised powers vested? with the police in matters relating to the NDPS Act and similar laws carrying a reverse burden of proof. An investigation is a systemic collection of facts for the purpose of describing what occurred and explaining why it occurred. The word systemic suggests that it is more than a whimsical process. An investigator will collect the facts relating to the incident under investigation. The fact is a mere information and is not synonymous with the truth. Kader (supra) is, therefore, overruled. We approve the view taken in Naushad (supra).

25. In view of the conflicting opinions expressed by different two Judge Benches of this Court, the importance of a fair investigation from the point of view of an accused as a guaranteed constitutional right under Article 21 of the Constitution of India, it is considered necessary that the law in this regard be laid down with certainty. To leave the matter for being determined on the individual facts of a case, may not only lead to a possible abuse of powers, but more importantly will leave the police, the accused, the lawyer and the courts in a state of uncertainty and confusion which has to be avoided. It is therefore held that a fair investigation, which is but the very foundation of fair trial, necessarily postulates that the informant and the investigator must not be the same person. Justice must not only be done, but must appear to be done also. Any possibility of bias or a predetermined conclusion has to be excluded. This requirement is all the more imperative in laws carrying a reverse burden of proof.

26. Resultantly, the appeal succeeds and is allowed. The prosecution is held to be vitiated because of the infraction of the constitutional guarantee of a fair investigation. The appellant is directed to be set at liberty forthwith unless wanted in any other case.