

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ Cr1.M.C.No.3784/2009

% Reserved on: 16th February, 2010
Date of Decision: 22nd February, 2010

JUDE CHIDIBERE & ORS. Petitioners
! Through: Mr.Manish Kumar Khanna,
Advocate

Versus
\$ N.C.B. Respondent
^ Through: Mr.Satish Aggarwala &
Ms.Hrishika Pandit, Advs.

* **CORAM:**
HON'BLE MR. JUSTICE V.K. JAIN

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| 1. | Whether the Reporters of local papers may be allowed to see the judgment? | Yes |
| 2. | To be referred to the Reporter or not? | Yes |
| 3. | Whether the judgment should be reported in the Digest? | Yes |

: **V.K. JAIN, J.**

1. This is a petition under Section 482 of the Code of Criminal Procedure seeking independent investigation into the allegations made against the petitioners.

2. A complaint dated 21.8.2009 for the offences punishable under Section 21 of NDPS Act read with Section 29 thereof was filed against the petitioners by Narcotics

Control Bureau. It was alleged in the complaint that on receipt of information that some foreign nationals, residing in WZ-40/2, 2nd Floor, Sant Garh, Delhi, were indulging in supply of narcotic drugs, a team of NCB Officers reached that house at about 11.00 p.m. on that day. Two independent persons, namely, Raman Singh and Paramjit Singh, were joined in the raiding party. The door of the house was opened by a Thai national Supattra. On entering the room, the raiding party found seven foreign nationals, including the petitioners who were carrying out some packing in suitcases and shoes, etc. On seeing the raiding party, they started running inside the house, but, were surrounded by the team. Two suitcases were seized, one from the possession of Ms.Maria Lucia and the other from the possession of Ms.Isabel Bonificio, co-accused of the petitioners. Off-white colour substance was found concealed in both the cases and also in a polythene kept in one corner of the room. Some shoes were also found kept in cardboard. When those shoes were checked after cutting them open, similar off-white colour powder substance was found concealed in their heels. On checking, the off-white colour substance tested positive for

Heroin. The total weight of Heroin was found to be 7 kg. The petitioners Jude Chidiebere and Godson Augustine were served with summons under Section 67 of NDPS Act requiring them to appear before Shri Vikas Kumar, Intelligence Officer, NCB, whereas the other petitioners were required to appear before Shri Jai Bhagwant, Intelligence Officer, NCB. Similar notices were served upon other accused. In his statement under Section 67 of NDPS Act, the petitioner Jude Chidiebere admitted his presence in house No.WZ-40/2, 2nd Floor, Sant Garh on the night intervening 13/14th April, 2009. He also admitted the search carried out by NCB officials and recovery of heroin in his presence. In reply to a specific question as to why he was packing heroin, he stated that his job was to pack heroin and he stated that the ladies present in the house were to go to South Africa with heroin seal in suitcases/shoes. He also admitted having received Rs.10,000/- for packing the material. The petitioner Solomon Ireme stated that he was staying in Sant Garh along with his friend. The petitioner Godson Augustine admitted the search by NCB officials and recovery of heroin. He also stated that the ladies present in the house had to

leave for South Africa, with heroin in the suitcase and shoes. The petitioner Ebie Godfrey stated that he had come to the house of his friend on the second floor in property No.WZ-40/2, Sant Garh, Delhi and they eight foreigners were concealing Heroin in suitcase and chappals. He also admitted the search carried out by NCB officials and recovery of heroin by them. The petitioner Vincent had stated that his friends staying in house No.WZ-40/2 paid him for stuffing white powder in the suitcases. He also admitted search and seizure by NCB officials. Maria Lucia, co-accused of the petitioners stated that one person Ekenna had promised to help her with money if she took a bag containing Heroin to South Africa. She further stated that Ekenna called some of his friends at his house at WZ-40/2, Sant Garh, Delhi for filling up the bags for concealing drug. She admitted that she and other persons were present in the house and were packing the bags with Heroin, when NCB officials came there and carried out the search. She also admitted the recovery of heroin by NCB officials. Supattra, co-accused of the petitioner who had opened the door at the time of raid by NCB officials stated that she was staying in house No.WZ-

40/2, IInd Floor, Sant Garh, Delhi, with her friend Maria Lucia. She also admitted the search and seizure carried out by NCB officials. The petitioners were thereafter arrested. It has been further alleged in the complaint that Sunita, owner of House No.WZ-40/2 also appeared before the Intelligence Officer pursuant to the summons served upon her and she stated that she had let out the IInd Floor of the house to Ms.Lovunge Ngullie and she also identified the accused persons as those who were residing in or frequenting the second floor o her house. The samples of Heroin when examined by CRCL were found to contain 40% Diacetylmorphine.

3. The case of the petitioners, as stated in the petition, is that NCB officials carried out search of some other premises and the persons of black origin who were present in that house managed to escape. While searching them in neighbouring houses NCB officials found the petitioners and forming a *bona fide* opinion that they must have been those boys who had run away of seeing them, NCB officials framed the petitioners in this case.

4. The petitioners have placed on record the affidavit of one Lakhvinder Kaur, who claims to be the wife of the owner of house No.C-6, Gali No.14, Sant Garh, Tilak Nagar. In her affidavit annexed to the petition, she has stated that on 13th, at about 10.30 or 11.00 p.m., when she was walking, after taking dinner, she saw 8-10 persons coming with Dandas, chains and handcuffs. Three/four persons went upstairs of a house, which was one house away from her house. She heard sound of glass-breaking and someone shouting that “they have run from the back side”. The persons who were standing downstairs ran to the back side of the house. After sometime, they came back and asked her whether any South African was living there. She told them that some South Africans were living in her house with her permission. They went inside along with her and her husband. Six boys who were present there were taken for some verification. After coming out, one of the boys escaped while the remaining five were chained and taken in a van. She has further stated that she did not see anything being recovered from her house.

5. The petitioners have also filed the affidavit of one Inderjeet Singh, who has stated that his house is adjoining

house No.C-6, Ground Floor, Gali No.14, Sant Garh, Tilak Nagar. He further stated that at around 10.30 or 11.00 p.m., when he came to his terrace on hearing commotion, he saw some boys getting out of a house which was two houses away from his house. He also saw some officials, including one wielding a pistol and asking the boys to get inside. He saw some staff members entering the house of Lakhvinder Kaur. Subsequently, he saw staff bringing out six boys, out of whom one was able to ran away and remaining, including Godson and Solomon were taken away.

6. The petitioners have also filed the affidavit of one Mr.Cosmos Azonim Ehiedu, who claims to be friend of Solomon and Godfrey. In his affidavit, he has stated that he had come along with Lakhvinder Kaur and Inderjeet Singh and had introduced to them to Shri Manish Kumar Khanna, the learned counsel for the petitioners.

7. Relying upon the affidavits filed with the petition, the petitioners have sought independent investigations into the matter from an independent authority. Crl.M.A.1318/2009 has also been filed by the petitioners seeking a direction to the respondent to put them to lie detector test, brain mapping

and narco-analysis test. It has been further prayed that in case the petitioners come out to be innocent, then every witness of the case should be put to these very tests in order find out the truth.

8. Admittedly, cognizance has been taken and the petitioners are facing trial pursuant to a complaint filed by the Intelligence Officer before the Special Judge. If the procedure prescribed for trial before a Court of Sessions, laid down in Chapter XVIII of the Code of Criminal Procedure, followed, the stage of defence, as provided in Section 233 of the Code, would come only after the evidence for prosecution has been recorded and after taking evidence, examining the accused and hearing the prosecution and defence on the point the Judge comes to the conclusion that the accused is not entitled to acquittal under Section 232 of the Code. In case of trial of warrant cases instituted on police report, the stage for asking the accused to enter upon his defence arise only after evidence for prosecution has been recorded in terms of Section 242 of the Code. In case of trial of warrant cases instituted otherwise than on a police report, the stage for defence evidence only after evidence in terms of Section

244 has been recorded, the accused is not discharged in terms of Section 245 and after framing charge against him, evidence in terms of sub-Section 5 and sub-Section 6 of Section 246 of the Code has been recorded. If he so applies, the Magistrate will issue process for compelling the attendance of any witnesses, for the purpose of his examination or production of any document, as the case may be, unless he is of the view that the request made by the accused is vexatious or has been made for the purpose of delaying the trial or defeating the ends of justice. Thus, the scheme of the Code does not envisage consideration of the defence available to the accused at any stage before recording of evidence of the prosecution. If the defence available to the accused is considered at this stage, that would be absolutely contrary to the scheme of trial envisaged in Chapter XIX of the Code of Criminal Procedure. Hence, to examine the defence of the accused, at this stage, will be in violation of the mandate contained in the Code of Criminal Procedure.

9. In ***State of Orissa vs. Debendra Nath Padhi*** 2005(1) SCC 568, a Three Judges Bench of the Hon'ble Supreme Court, inter alia, held that at the time of framing charge or

taking cognizance the accused has no right to produce any material. The Hon'ble Supreme Court held that its earlier decision in **Satish Mehra vs. Delhi Admn.**, (1996) 9 SCC 766, holding that the trial court had powers to consider even materials which the accused may produce at the stage of Section 227 of the Code, had not been correctly decided. After considering a number of decisions on the issue before it, the Hon'ble Supreme Court, inter alia, observed as under:-

“All the decisions, when they hold that there can only be limited evaluation of materials and documents on record and sifting of evidence to prima facie find out whether sufficient ground exists or not for the purpose of proceeding further with the trial, have so held with reference to materials and documents produced by the prosecution and not the accused. The decisions proceed on the basis of settled legal position that the material as produced by the prosecution alone is to be considered and not the one produced by the accused. The latter aspect relating to the accused though has not been specifically stated, yet it is implicit in the decisions. It seems to have not been specifically so stated as it was taken to be well settled proposition.”

It was contended before the Hon'ble Supreme Court that the procedure which deprives the accused to seek

discharge at the initial stage by filing unimpeachable and unassailable material of sterling quality would be illegal and violative of Article [21](#) of the Constitution since that would result in the accused having to face the trial for long number of years despite the fact that he is liable to be discharged if granted an opportunity to produce the material and on perusal thereof by the court.

The contention was rejected by the Hon'ble Supreme Court noticing that if it is accepted there would a mini trial at the stage of framing of charge, which would defeat the object of the Code. The Hon'ble Court observed that it is well-settled that at the stage of framing of charge the defence of the accused cannot be put forth and felt that acceptance of the contention of the learned counsel for the accused would mean permitting the accused to adduce his defence at the stage of framing of charge and for examination thereof at that stage which is against the criminal jurisprudence. As regards some observations made in ***Minakshi Bala vs. Sudhir Kumar*** (1994) 4 SCC 142, the Hon'ble Court noted that in the above referred case the Supreme Court was considering the rare and

exceptional cases where the High Court may consider unimpeachable evidence while exercising jurisdiction for quashing under section 482 of the Code of Criminal Procedure. In ***State Anti-Corruption Bureau vs. P. Surya Prakashan*** 1999 SCC(CrL.) 373, the Hon'ble Supreme Court held that the only right the accused has at this stage is of being heard and nothing beyond that.

10. The statements contained in the affidavits of Smt.Lakhvinder Kaur, Shri Inderjeet Singh and Mr.Cosmos Azonim Ehiedu, are nothing but the evidence which the petitioners claims to have in their defence. If these affidavits are taken into consideration and a re-investigation or fresh investigation is directed on the basis of these affidavits, that will amount to not only taking the defence available to the petitioners into considerations at the very initial stage of trial but also to ask the investigating agency to verify the defence being taken by the petitioners thereby relieving them of discharging the onus placed upon them by law, to substantiate the defence taken by them. This, to my mind, will be contrary to the scheme contained in Code of Criminal Procedure and in disregard of the law laid by the Hon'ble

Supreme Court in the case of Debendra Nath Padhi (supra).

11. In ***Randhir Singh Rana vs. The State*** AIR 1997 SC 639, the learned Magistrate ordered further investigation after accused had made his appearance and the case was at the stage of considering whether charge should be framed or he should be discharged. The Hon'ble Supreme Court held that the Magistrate on his own cannot order further investigation.

12. In ***Rajesh & Ors. Vs. SHO Ist Town, Kadappa*** 2001 (10) SCC 759, the order passed by the High Court directing a fresh and further investigation was set aside by the Hon'ble Supreme Court holding that the High Court had overstepped its jurisdiction by directing further investigation.

13. In ***Rita Nag Vs. State of West Bengal***, 2009 (4) LRC 11 (SC), the Hon'ble Supreme Court has, inter alia, held as under:

“What emerges from the above-mentioned decisions of this Court is that once a charge-sheet is filed under Section 173(2) Cr.P.C. and either charge is framed or the accused are discharged, the Magistrate may, on the basis of a protest petition, take cognizance of the offence complained of or on the

application made by the investigating authorities permit further investigation under Section 173(8). The Magistrate cannot suo moto direct a further investigation under Section 173 (8) Cr.P.C. or direct a re-investigation into a case on account of the bar of Section 167 (2) of the Code.”

14. In **K. Chandrasekhar vs. State of Kerala**, AIR 1998 SC 2001, the Hon’ble Supreme Court, inter alia, observed as under:

“From a plain reading of the above section it is evident that even after submission of police report under sub-section (2) on completion of investigation, the police has a right of further investigation under sub-section (8) but not 'fresh investigation' or 're-investigation'.... The dictionary meaning of 'further' (when used as an adjective) is 'additional'; more; supplemental. 'Further' investigation therefore is the continuation of the earlier investigation and not a fresh investigation or reinvestigation to be started ab initio wiping out the earlier investigation altogether.”

Since the petitioners claim to be innocent, whereas the complainant, after carrying out investigation, has concluded that they are guilty of having committed offences punishable under NDPS Act, the request of the petitioners seeking investigation on the lines of affidavits of persons who claim

them to be innocent, is a prayer for re-investigation and not for further investigation by another agency.

15. It is true that the power of this Court under Article 226 of the Constitution of India is not fettered by the provisions contained in Section 173(8) of the Code of Criminal Procedure. But even while exercising its jurisdiction under Article 226 of the constitution, the court needs to refrain from giving directions which would be contrary to and upset the scheme of trial laid down in the Code of Criminal Procedure. Ordinarily, it would not be appropriate for the High Court to order a re-investigation or even fresh investigation at the behest of an accused, when cognizance of the offence, alleged to have been committed by him, has already been taken by competent court and he is already facing trial on the allegations made against him.

16. In case this Court directs a re-investigation fresh or further investigation by an agency other than Narcotics Control Bureau, as is sought by the petitioners, and that agency after carrying out investigation and on the basis of the evidence collected by it, comes to the conclusion that the petitioners or some of them are innocent, that would result in

the Court being saddled with two contradictory sets of evidence, one collected by Narcotics Control Bureau, showing the commission of offence by them, and the other collected by the new agency showing them to be innocent, and if that happens, it would upset the entire Scheme of trial contained in the Code of Criminal Procedure since it will not be possible for the court to dismiss the complaint filed by Narcotics Control Bureau and acquit or discharge the petitioners only on account of the evidence collected by the other agency in their favour. The Court cannot compel the complainant to rely upon and produce the evidence collected by the other agency, as his evidence. Unless the complainant is given an opportunity to present his evidence before the trial court, in accordance with the scheme contained in the court, it would not be permissible for the trial court to give a finding on the truthfulness or otherwise of the allegations contained in the complaint. Therefore, since cognizance of the offence has already been taken and the petitioners are already facing trial for the offences punishable under the provisions of the NDPS Act, it would not be appropriate for the court to direct a fresh investigation or re-investigation by some other agency.

17. Even otherwise, the affidavits filed by the petitioners are not such a strong reason as would persuade the Court to order fresh investigation or re-investigation by some other agency despite cognizance having already been taken by a competent court and the petitioners are already being tried, and despite the fact that if direct such an investigation that will not be in consonance with the scheme contained in Chapter XIX of the Code of Criminal Procedure. No evidence of an unimpeachable nature warranting a re-investigation or even a fresh investigation at their behest has been produced by the petitioners, nor is there any such circumstance as would warrant a departure from the procedure prescribed in the Code. It may not be difficult to obtain such affidavits from private persons and if re-investigation or fresh investigation is ordered by this Court on the basis of such affidavits, the Court would be flooded with petitions from persons who are already facing trial and who have no difficulty in obtaining affidavits from those who are willing to support them either on account of relationship or friendship with them or for extraneous considerations. The appropriate course of action for an accused is to produce these persons

as his witnesses at an appropriate stage, as envisaged in the Code of Criminal Procedure so that their testimony may be tested by subjecting them to cross-examination.

18. Even otherwise, prima facie, sufficient evidence appears to have been collected by Narcotic Control Bureau, to prove the offence alleged to have been committed by the petitioners. Besides the testimony of NCB officials, who formed the raiding party that seized the heroin from House No.WZ-40/2, Sant Garh, Delhi, independent evidence in the form of statements of public witnesses Raman Singh and Paramjit Singh who were joined in the raiding party and who were examined under Section 67 of NDPS Act is available against the petitioners. The landlady of House No.WZ-40/2, Sant Garh, Delhi, Smt. Sunita has also been examined under Section 67 of NDPS Act and she also has supported the case of the complainant and has identified the petitioners in the office of NCB. The petitioners themselves have been examined under Section 67 of NDPS Act and have admitted the allegations made against them in the complaint. Even if these statements have been retracted by them, that by itself does not render them inadmissible in evidence, particularly

when corroborative evidence in the form of depositing of NCB officials as well as public witnesses and the landlady of the house is available.

19. As regards the request of the petitioners for directing the respondent to subject them to Lie Detector Test, Brain Mapping and Narcotic Analysis Test, the obvious purpose is to establish on the basis of outcome of these tests that they are innocent. The reasons for not directing reinvestigation or a fresh investigation on the request of an accused hold equally good for not directing the respondent to subject them to these tests, on their request.

20. Section 53 (1) of the Code of Criminal Procedure deal with examination of an accused by a medical practitioner and reads as under:-

“53. (1) Examination of accused by medical practitioner at the request of police officer.-(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered medical practitioner, acting at the request of a

police officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose.

(2) Whenever the person of a female is to be examined under this section, the examination shall be made only by, or under the supervision of, a female registered medical practitioner.”

21. A bare perusal of the above referred provision would show that (i) examination of an accused is envisaged only during investigation and not after its conclusion and (ii) the examination is envisaged only if so requested by a Police Officer. The obvious purpose is to help the Investigating Officer to collect such evidence as the medical examination of the accused may disclose. There is not specific provision in the Code of Criminal Procedure for medical examination of the accused, at his request, in order to enable him to prove his defence. May be, if an accused wants his medical examination, in order to substantiate the defence taken by him, there may not be a valid objection to the Court directing such a medical examination even in the form of Lie Detector

Test, Brain Mapping or Narco Analysis Test, provided such a request is made by the accused only at the stage he is called upon to enter his defence. It would be contrary to the scheme of trial contained in the Code of Criminal Procedure if such tests are directed, on the request of an accused, at the stage when the prosecution is yet to lead its evidence and the accused is yet to be called upon to enter upon his defence.

22. The learned counsel for the petitioners has referred to the decision of this Court in “**Shailender Sharma Vs. State & Another**”, 2009 (107) DRJ 499, where a learned Single Judge, while upholding the directions of the trial court for narco analysis of the petitioner Shailender Sharma held that an incriminating statement, if made by the accused during the test, cannot be used against him since use of such a statement would be in contravention of the protection available to an accused against self-incrimination. In the case relied upon by the learned counsel for the petitioner, Narco Analysis Test was directed on the request of the prosecution and not on the request of an accused. Nowhere does this judgment lay down the proposition that Narco Analysis Test, Lie Detector Test or Brain Mapping Test can be directed on

the request of an accused, even after cognizance of the offence has been taken but the accused is yet to be called upon to enter upon his defence.

23. The learned counsel for the petitioners has referred to the decision of the Hon'ble Supreme Court in "**Ashish Batham Vs. State of Madhya Pradesh**", 2002 (4) Crimes 220 (SC). On a perusal of this judgment, I have not been able to find any such proposition in it as would persuade me to direct re-investigation or further investigation at the instance of an accused. The learned counsel has also submitted abstract from para 379 from the decision of the Hon'ble Supreme Court in "**Kartar Singh Vs. State of Punjab**", 1994 (3) SCC 569. Again, I am unable to find any such proposition in this judgment as would persuade me to pass directions of the nature sought by the petitioners.

For the reasons given in the preceding paragraphs, I find no merit in the petition and the same is hereby dismissed.

(V.K.JAIN)
JUDGE

FEBRUARY 22, 2010
RS/