

HON'BLE Dr. JUSTICE B.SIVA SANKARA RAO

CRIMINAL PETITION Nos.6901, 6918 & 6928 of 2018

COMMON ORDER:

1(a). The petitioners in CrI.P.No.6901 of 2018 are accused Nos.1 to 121 in STC.No.474 of 2015 pending on the file of learned I Special Judicial Second Class Magistrate, Tirupati, taken cognizance for the offences punishable under Section 3 & 4 of A.P. Gaming Act from the raid conducted and offence detected and petty case filed in crime No.10 of 2015 dated 12.01.2015 by the SHO, Alipiri Police Station, Tirupati.

1(b). The petitioners in CrI.P.No.6918 of 2018 are accused Nos.1 to 40 in STC.No.325 of 2017 pending on the file of learned I Special Judicial Second Class Magistrate, Tirupati, taken cognizance for the offences punishable under Section 3 & 4 of A.P. Gaming Act from the raid conducted and offence detected and petty case filed in crime No.209 of 2016 dated 05.10.2016 by the SHO, Alipiri Police Station, Tirupati.

1(c). The petitioners in CrI.P.No.6928 of 2018 are accused Nos.1 to 50 in STC.No.326 of 2017 pending on the file of learned I Special Judicial Second Class Magistrate, Tirupati, taken cognizance for the offences punishable under Section 3 & 4 of A.P. Gaming Act from the raid conducted and offence detected and petty case filed in crime No.212 of 2016 dated 09.10.2016 by the SHO, Alipiri Police Station, Tirupati.

2. The contentions in the quash petitions in nutshell are that the very respective *suo motu* complaints registered by

police in filing charge sheets from the so called investigation are false and baseless and even no way discloses involvement of any of the petitioners in any of the 3 cases and those are filed only to harass them and the members of the society which is running according to law, that in spite of having valid licences and orders of competent Civil Courts and from the High Court the cases are filed as an abuse of process.

3. So far as STC.No.325 of 2017 concerned, it is contended that the civil suit is OS.No.1177 of 2007 and there is EA.No.71 of 2016 in OEP.No.92 of 2015 and advocate commissioner was appointed and in violation of the said orders the crimes registered and in STC.No.326 of 2017 for the contempt case filed in CC.No.710 of 2016 against the respondent-police under the threat to cause withdrawal of the same the false case was foisted.

4. The other contentions in the course of hearing while reiterating the same in all the 3 matters is that the person who conducted the raid, registered the FIR and conducted investigation and filed final report is one and the same and *per se* caused prejudice to the accused with pre-conceived mind in commencing the investigation and thereby the same is not permissible under law and are liable to be quashed.

5. Though the other contentions have no much force to consider, so far as the last contention raised concerned of complainant and IO cannot be same person:

5(a). In **The Public Prosecutor, High Court of Andhra Pradesh, Hyderabad Vs. Mohd. Mansoor @ Abu Khafa**¹, it was observed by a single Judge of this Court referring to Sections 2, 36, 41, 42 & 156 Cr.P.C. and Sections 5 & 24 of Evidence Act that a police officer cannot be a complainant except in cases where he submits its report in a non-cognizable case and powers exercisable by a police officer in charge of police station are also exercisable by superior officers. The Court referred for that purpose at Para 17 of the Apex Court judgment in **Bhagwan Singh Vs. State of Rajasthan**², that was referred by the several High Courts.

5(b). In **Bhagwan Singh** supra it was observed that there is no point in allowing investigation to continue with this infirmity and if it results in filing of the charge sheet, to allow the trial to be proceeded and at the end of the trial to consider the question, whether the fact of the complainant being the investigating officer has adversely affected the credibility of the prosecution case and therefore since the matter has been brought to the notice of the Court at the earliest, the learned Judge allowed the petition and quashed the proceedings subsequent to the recording of the First Information Report, it is made that it will not preclude further investigation by another officer other than the complainant.

¹ 2001 (1) APLJ 455

² 1975 SCC (Crl) 737

5(c). In **Megha Singh Vs. State of Haryana**³, it was observed that such recourse cannot be resorted, to say that there cannot be any basis to suspect fair and impartial investigation.

5(d). In **State represented by Inspector of Police, Vigilance and Anti-Corruption, Tiruchirapalli, T.N. Vs. Jayapaul**⁴ it was observed by the Apex Court (2JB) that the investigation by the same police officer who lodged the FIR is not barred by law if at all such investigation could only be assailed on the ground of bias or real likelihood of bias on the part of the IO. The same would depend upon facts and circumstances of each case and thereby not proper to lay down a broad and unqualified proposition that such investigation necessarily would be unfair or biased.

5(e). The Court relied for that **State of Uttar Pradesh v. Bhagwant Kishore Joshi**⁵ (2JB), where it was observed that *suo motu* move on the part of the police officer to investigate a cognizable offence impelled by the information received from some sources is not outside the purview of Sections 154 to 157 Cr.P.C. or other provisions of the Code and there is no principle or binding authority to hold that the moment competent police officer on the basis of information received makes out FIR incorporating his name as informant he forfeits his right to investigate if at all such investigation

³ AIR 1995 SC 2339

⁴ 2004 (5) SCC 223

⁵ AIR 1964 SC 221

could be only be assailed on the ground of bias or real likelihood of bias on the part of IO. It all depends on the facts and circumstances of each case and not proper to laid down a broad and unqualified proposition. It also referred **Bhagwan Singh** and **Megha Singh** supra, however distinguished and explained on facts the case on hand is under PC Act referring to Section 17 from the power of Inspector of Police to investigate the offence under PC Act.

5(f). Coming to the other Two Judge Bench expression of the Apex Court in **S. Jeevanantham Vs. State through Inspector of Police, T.N**⁶, it is observed referring to **Megha Singh** supra and distinguished, having followed **Jayapaul** supra in holding when nothing pointed out to show that said investigation is caused prejudice or IO was biased against accused which is a case under Narcotic Drugs from the investigation by the complainant-police officer must not be held invalid.

5(g). In **Mohan Lal Vs. State of Punjab**⁷, the Three Judge Bench expression of the Apex Court referring to **Bhagwan Singh, Megha Singh** supra and **State by Inspector of Police, Narcotics Intelligence Bureau, Madurai, Tamilnadu Vs. Rajangam**⁸ and in **Noor Aga Vs. State of Punjab**⁹ observed at Paras 14 & 15 as follows:

⁶ 2004 (5) SCC 230

⁷ 2018 SCC Online SC 974

⁸ 2010 (15) SCC 369

⁹ (2008) 16 SCC 417

“14. 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.

15. 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 v. 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.”

5(h). It is further observed in Paras 18 to 31 as follows:

18. 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.

19. 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 v. 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.”

20. *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.

21. *Hardip Singh v. 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 v. V. Jayapaul*, (2004) 5 SCC 223 observing as follows:

“6.... 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.”

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

23. *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.

24. In *Surender* (supra), the prosecution was under the NDPS Act. There was no independent witness. The objection that PW-6, Sub-inspector 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.

25. 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 v. 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:

“10.8 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.”

26. A similar view has been taken in *Shri Fayas Ali v. 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.”

27. The Punjab & Haryana High Court in *Gannu v. State of Punjab*, 2017 (3) RCR (criminal) 566 (Crl. Appeal No. 1688-SB 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*, 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.”

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

“...In a case of this nature, when the complainants 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.”

29. Disapproving of the same, a Division Bench in *Kader v. 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.”

30. 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).

31. 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.

6. From the above, the fairness requires investigation by police officer other than the officer who detected the crime

and from the proceedings reported before the police station in registration of the crime, rather than investigation by himself.

7. Having regard to the above, the cognizance orders in STC.Nos.474 of 2015, 325 & 326 of 2017 are set aside by reverted the clock back to the crime registration stage in directing the Superintendent of Police concerned to handover the investigation to another police officer other than the person who conducted the raid and detected the crime and registered the FIR if any even.

8. Accordingly and in the result, all these Criminal Petitions are allowed only to the above extent.

Miscellaneous petitions, if any, shall stand closed.

Dr. B. SIVA SANKARA RAO, J

Date: 14.11.2018
ska

