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

Reserved on : 29th September, 2018
Pronounced on: 27th November, 2018

+ Crl.A.1151/2014

LEYSLIENER ZANDILE LUTHULI Appellant
Through: Ms. Inderjeet Sidhu,
Adv.(DHCLSC)

versus

DIRECTORATE OF REVENUE INTELLIGENCE
..... Respondent
Through: Mr. Satish Aggarwala,
Adv.

CORAM:
HON'BLE MR. JUSTICE C. HARI SHANKAR

J U D G M E N T

1. The impugned judgment, dated 12th February, 2014, of the learned Special Judge (NDPS), convicts the appellant of having committed an offence punishable under Section 21(c) of the Narcotics, Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as “the NDPS Act”). The subsequent order on sentence, dated 17th February, 2014, sentences her, for the said offence, to rigorous imprisonment of 10 years and a fine of ₹ 1 lakh.

2. The law, as it has developed over time, entitles the appellant to acquittal. I do not intend, therefore, to burden this judgment with more facts than are necessary to understand the controversy in issue.

3. The case of the prosecution may be set out thus:

(i) PW-1 Anju Singh received intelligence that the appellant, a lady of African origin, would be coming to ISBT, Delhi, by a Punjab Roadways bus at about 8:15 PM on 5th January, 2009, carrying narcotic drugs. Following thereon, a team of officers of the Directorate of Revenue Intelligence (DRI), accompanied by two public witnesses, Harendra and Vishal, intercepted the appellant, when she was disembarking from a Punjab Roadways bus. She was found carrying a black backpack. On being asked whether she was carrying narcotics, the appellant replied in the negative. She was, thereafter, given a written notice, under Section 50 of the NDPS Act (Ex. PW-1/B), giving her the option of having her search conducted in the presence of a Magistrate or a Gazetted Officer. She refused the offer in writing, and expressed her agreement to be searched by any lady officer. She also requested that the search be not carried out at the place of her interception as it was crowded and unsafe. Thereafter, she, along with the two public witnesses Harendra and Vishal, was brought to the DRI office, where the backpack carried by her was searched, which was found to contain, *inter alia*, two black polythene packets. On opening the said packets, they were found to contain one packet each, wrapped with brown adhesive tapes. The said two packets were marked 'A' and 'B', and their gross weight was found to be 1.057 kg and 1.026 kg respectively. On opening the said packets, each packet was found to contain a smaller transparent

polythene packet. Each transparent polythene packet was, in turn, found to contain yet another packet, covered with white cloth bags having holes and containing markings. Each white cloth bag, in other words, contained a transparent polythene packet which, on being further opened, was found to contain pungent, off-white coloured powder/granules. On testing a pinch of the powder, from each of the said two packets, using the Field Drug Testing Kit, it was found to test positive for heroin. The net weight of the powder was found to be 0.985 kg and 0.960 kg, working out to a total of 1.945 kg. The powder, along with its packing material and the backpack, were seized under the NDPS Act.

(ii) Three representative samples, of 5 g each, were retrieved from the aforementioned packets and kept in separate polythene pouches, marked A-1, A-2 and A-3, and B-1, B-2 and B-3 respectively. These pouches were further kept in separate brown envelopes sealed with the DRI seal and paper slips bearing the dated signatures of the complainant, PW-1, the appellant and the two *panch* witnesses. The sealed packets and packing material were put in a metal box which was wrapped with a cloth, stitched and sealed with the DRI seal, with paper slips containing signatures of the aforementioned signatories.

(iii) PW-1 prepared triplicate test memos, Ex. PW-1/N-1, PW-1/N-2 and PW-1/N-3. The entire proceedings were recorded in a detailed *panchnama* Ex. PW-1/C, signed by all

above persons. The facsimiles of the DRI seal, used in the proceedings, were affixed on the *panchnama* and test memos. The samples were, subsequently, deposited in the Central Revenues Control Laboratory (CRCL). It may be noted, here, that the test reports of the CRCL indicated that the samples tested positive for heroin, of 67% and 71.2% purity.

(iv) In response to the summons served on her, the appellant tendered her voluntary statement, dated 5th January, 2009 (Ex. PW-1/K), under Section 67 of the NDPS Act, before PW-1. During the course of the said statement, which continued over the next day, i.e. 6th January, 2009, the appellant stated that her friend Ms. Lucy had introduced her to the business of narcotics, in which she agreed to be involved as she was in need of money. She further deposed that, on 3rd January, 2009, she, and Ms. Lucy, flew to Amritsar, where they collected some packets of narcotics from an unknown person, which she concealed in her bag. Payment, in US Dollars, was made, by Ms. Lucy, to the person who had delivered the narcotics. The appellant further disclosed, in her second statement, that she had concealed the narcotics in her backpack as instructed by Ms. Lucy, who also directed her to carry the drugs, in her backpack to Delhi by bus, and hand them over to Mr. Ben, who would pay her US\$ 2000/- for the job. The appellant further deposed that the seizure, effected from her, was of the same drugs.

4. The appellant was arrested, and subsequently remanded to judicial custody on 6th January, 2009.

5. The complainant PW-1 sent a detailed information/report, under Section 57 of the NDPS Act, to PW-2.

The Trial

6. Fifteen witnesses were examined by the prosecution.

7. PW-1 was the I/O, Anju Singh, who testified regarding receipt of secret intelligence, reduction thereof into writing (Ex. PW-1/A), constitution of the raiding team and filing of complaint by her. Para 15 of the impugned judgment clearly records that PW-1 Anju Singh “is also the complainant of this case and the main Investigating Officer”. She further deposed regarding the apprehension of the appellant, the recovery of heroin from her and the resumption of samples thereof. She, further, proved the various documents, which had been prepared by her, related to these proceedings. The deposition of PW-1 was supported by PW-2 Man Singh Yadav, who was the Senior Intelligence Officer of the DRI, to whom the I/O Anju Singh had put up the secret intelligence received by her. He deposed that he, further, put up the intelligence before his senior officer Atul Handa (PW-3, the Deputy Director, DRI), who directed constitution of the raiding team. He testified that he was a member of the said raiding team and confirmed the interception of the appellant and the recovery of the heroin from her. He also proved the report, under Section 57 of the

NDPS Act, which was submitted to him by PW-1, after the seizure. These facts were further corroborated by the deposition of PW-3 Atul Handa. Other departmental officers, too, testified; their testimonies are not, however, of particular significance, for deciding the controversy in issue.

8. The depositing of the sealed parcels, containing the powder recovered from the appellant, in the Customs godown, and the onward transport of the said parcels, and their deposit, with the CRCL, were proved by PW-8 Inspector Lakhi Ram, PW-10 Head Havaldar Kiran Pal Singh and PW-11 Rajesh Kumar Ohlan, also an I/O with the DRI. PW-7 Dr. Raj Kumar, Assistant Chemical Examiner, CRCL, testified that the samples were found to contain heroin.

9. Reference to the testimonies of other witnesses is not necessary.

10. In her statement under Section 313 of the Code of Criminal Procedure (hereinafter referred to as “the Cr PC”), the appellant, while denying the allegations against her, admitted her apprehension by the DRI officers, while she was carrying the bag, but denied the existence of any contraband in the bag. She, however, admitted to her having become friendly with Ms. Lucy while staying in the Uttam Nagar house with Ms. Magda and Mr. Ben, travelling with Ms. Lucy to Amritsar on 3rd January, 2009 and staying, with her, in a hotel on 3rd and 4th January, 2009. She admitted returning, by bus, carrying the bag given by Ms. Lucy, but denied any knowledge that the bag contained

heroin. She alleged that her statements had been dictated by the DRI officers. She did not choose to lead any evidence in her defence.

The impugned judgment and order

11. The learned Special Judge has convicted the appellant, reasoning thus:

(i) The statements of PW-1 and PW-2, who were witnesses to the recovery of heroin from the possession of the appellant, had made consistent uncontroverted depositions, regarding receipt of secret information, constitution of the raiding team, visit to the spot with two public witnesses, apprehension of the appellant with the bag, service of notice under Section 50 of the NDPS Act, as well as subsequent proceedings relating to search of the bag, recovery of the heroine, weighment, testing and sampling thereof, as also the preparation of parcels for further testing. Their oral depositions were corroborated by the *panchnama* (Ex. PW-1/C). They also deposed regarding the identity document of the appellant, her air ticket, boarding pass, and her bus tickets, all of which were recovered during the personal search of the appellant conducted by PW-1.

(ii) The objection, of learned counsel for the appellant, that the documents did not bear the signature of PW-2, and that there was no other documentary evidence to indicate that he was a member of the raiding team, could not discount against

the consistent uncorroborated depositions of PW-1 and PW-2. That apart, once the documents had been signed by PW-1, as well as the appellant and two *panch* witnesses, obtaining the signature of PW-2, or any other member of the raiding team, on the documents, was unnecessary.

(iii) The appellant did not choose to cross-examine PW-2, despite grant of opportunity.

(iv) The appellant had, moreover, in her statement under Section 313 of the Cr PC, admitted the visit of the DRI officers, her apprehension with the bag, as well as her being taken, with the bag, to the DRI office.

(v) The objection, raised by learned counsel for the appellant, that the two public witnesses Harendra and Vishal had not been examined, thereby rendering their participation in the raid doubtful, was without merit, as their dated signatures figured on all documents including the *panchnama* (Ex. PW-1/C), its annexure (Ex. PW-1/D), as well as other documents Ex. PW-1/E to PW-1/H. Besides, the participation of the said public witnesses was established by the deposition of PW-1 in cross-examination. The subsequent non-examination of the said two public witnesses was only because they were not found to be residing/existing at their given addresses. Given the fact that public witnesses are often reluctant to join investigations, the

furnishing, by them, of false addresses to PW-1, could not be ruled out.

(vi) In any case, non-joining of public witnesses was not fatal to the case of the prosecution, if the testimony of the official witnesses were credible and cooperative. Reliance was placed, for the purpose, on *M. Prabhulal v. A.D., DRI, (2003) 8 SCC 449* and *Ajmer Singh v. State of Haryana, (2010) 3 SCC 746*.

(vii) Besides the above evidence, the statements (Ex. PW-1/K and Ex. PW-1/R), tendered by the appellant under Section 67 of the NDPS Act, in response to the summons (Ex. PW-1/J), issued to her by PW-1, also fastened the guilt on her. The statements had been tendered by her prior to her arrest, and the statement tendered on 6th January, 2009 (Ex. PW-1/R), was in continuity to the statement (Ex. PW-1/K) tendered on 5th January, 2009. Both were written in English, which was a language well known to the appellant, and were recorded in her own handwriting. The statement dated 5th July, 2009 (Ex. PW-1/K) contained personal and family details, known only to the appellant. She had admitted, in her statement dated 6th July, 2009 (Ex. PW-1/R), having come into contact with Ms. Lucy, and had also explained how it came about. She also explained how Ms. Lucy had introduced her to the business of carriage of heroin. Except for the fact of actual carriage of heroin, all other details stood admitted, by the appellant, in her statement under Section 313 of the CrPC. As against this, there was only one

lone letter of retraction, which did not bear any date, and was neither written or filed in the court, nor endorsed by the learned Special Judge. It appeared to have been filed during remand proceedings, and did not appear to be in the handwriting of the appellant. Moreover, it used legal expressions, which could have been incorporated only on the basis of legal advice. No reference, to the said retraction, was contained in the statement of the appellant, under Section 313 of the Cr PC. In these circumstances, the mere allegation that her statements in Ex. PW-1/K and PW-1/R were dictated by DRI officers, could not erode them of their credibility. Her travel and other details also stood corroborated by the recovery of the air ticket (Ex. PW-1/E) and boarding pass (Ex. PW-1/9), from the possession of the appellant.

(viii) The plea of the appellant, regarding lack of knowledge of her carrying heroin, stood discountenanced by Sections 35 and 54 of the NDPS Act, which applied on all fours, as the appellant had been found to be in physical possession of the contraband heroin. The burden was, therefore, on her to account for the said possession. She had failed to discharge the said burden. Reliance was placed, in this context, on *Dharampal Singh v. State of Punjab*, (2010) 9 SCC 608 and *MadanLal v. State of HP*, (2003) 7 SCC 465.

(ix) The test report of the CRCL (Ex. PW-7/B) stood proved by the deposition of PW-7 Dr Raj Kumar. Both samples tested

positive for heroin, with percentages 67% and 71.2%, on the basis of which the weight of the seized heroin was around 1.37 kg, which was commercial quantity.

In these circumstances, the charge of having committed offence under Section 21(c) of the NDPS Act was, it was held, proved.

12. The appellant is in appeal.

Rival Contentions

13. I have heard Ms. Inderjeet Sidhu, learned counsel for the appellant and Mr. Satish Aggarwala, learned counsel for the DRI. Written submissions were also filed by both learned Counsel.

14. Ms.Sidhu advanced the following submissions:

(i) Though the raiding team had co-opted two public witnesses, namely Harendra and Vishal, they were never cited as witnesses by the prosecution. This was fatal. While the decisions, on which the learned Special Judge relied, did hold that public witnesses need not necessarily be involved in the raid, search and recovery proceedings, where public witnesses did exist, the non-co-opting, of such witnesses, by the prosecution, cast a cloud on the case sought to be built up against the accused. Ms.Sidhu relied, in this context, on para 23 of the judgment in *N.C.B. v. Anju Tiwari, 2014 SCC OnLine*

Del 2285 and paras 30 to 31 of the judgment in *Nnadi K. Iheanyi v. N.C.B., 2014 SCC OnLine Del 4537*. In the absence of examination of the public witnesses, the fact of recovery could not be said to have been proved beyond reasonable doubt. Ms. Sidhu highlighted the fact that the independent witnesses were, in fact, reflected in the list of witnesses cited by the prosecution, but were dropped as their addresses were incomplete and were not traceable. This, Ms. Sidhu submits, was not believable. It gave rise to a reasonable presumption that the witnesses were fake, and that their names had been included to provide credibility to the case of the prosecution. This also, concomitantly, diluted the evidence of PW-1 and PW-2, who had not signed the documents executed during investigation. Ms. Sidhu submitted that the case deserved drawing of an adverse inference, against the prosecution, under Section 114(g) of the Indian Evidence Act, 1872 (hereinafter referred to as “the Evidence Act”).

(ii) The proceedings also stood completely vitiated by the sole fact that the complainant and the I/O were one and the same person, i.e. PW-1 Anju Singh. Reliance was placed, for this purpose, on *Mohan Lal v. State of Punjab, 2018 SCC Online SC 974*.

(iii) The learned Special Judge had erred in failing to take notice of the fact that the statement, of the appellant, under Section 67 of the NDPS Act, had been retracted by her. The

appellant had, in fact, relied on the said retraction even in her statement under Section 313 of the Cr PC.

(iv) In the circumstances, Ms.Sidhu submits that the appellant could not be burdened with conscious possession of the contraband heroin.

15. Mr. Satish Aggarwala contends, *per contra*, as under:

(i) Ms. Anju Singh was neither the informant nor the I/O. In fact, there was no informant in this case, and Anju Singh was the seizing officer. The judgment in ***Mohan Lal (supra)*** did not bar the seizing officer from being the complainant. The bar was against the informant and the investigator being the same person, as was reflected in the concluding para of the judgment. The case was based, not on information, but on intelligence developed by the DRI. Reliance was placed, for this purpose, on the testimony of Ms.Anju Singh, during trial, as PW-1.

(ii) Ms. Anju Singh had filed the complaint, against the appellant, before the Court, only in her official capacity, and in due discharge of her official duties.

(iii) In such circumstances, the fact that Ms.Anju Singh had filed the complaint against the appellant, could not vitiate the proceedings. Reliance was placed, for this purpose, on the judgment of the Supreme Court in ***Hardeep Singh v. State of***

Punjab, AIR 2009 SC 432, which upheld the conviction of the accused, though the officer who effected the recovery was made the I/O.

(iv) There was no reason to doubt the evidence of the Police witnesses (i.e. the DRI witnesses), who had no enmity against the appellant.

(v) Co-opting of public witnesses was not a *sine qua non*, in law, for a valid search, seizure or recovery. Consequently, non-inclusion of such witnesses, as witnesses for the prosecution, too, did not vitiate the proceedings. In any case, the reason for dropping Harendra and Vishal as witnesses of the prosecution was genuine, i.e., the addresses given by them were found to be incorrect.

(vi) The statement of the appellant, under Section 67 of the NDPS Act, had been recorded without subjecting her to any kind of coercion. The said statement, therefor, inculpated the appellant conclusively.

16. Needless to say, on the basis of the above noted submissions, advanced by them orally as well as in writing, Ms. Sidhu and Mr. Aggarwala prayed, respectively, for acquittal of the appellant, and for dismissal of her appeal.

Analysis

17. I am of the opinion that the appellant is entitled to acquittal on both the accounts urged by Ms. Sidhu, i.e., because PW-1 was complainant as well as I/O, and because the public witnesses, who had supposedly been co-opted during investigation, had been dropped by the prosecution, after citing them as witnesses in their support. I do not intend, therefore, to enter into any other intricacies of the submissions advanced by learned counsel.

18. The reliance, by Ms. Sidhu, on the judgment of the Supreme Court in *Mohan Lal (supra)* is well taken. The semantic calisthenics, to which Mr. Aggarwala would seek to resort, by attempting to distinguish between “seizing officer”, “complainant” and “informant”, unfortunately, cannot detract from the applicability of the said decision, to which Article 141 of the Constitution of India lends its imprimatur. I have had occasion to examine the applicability of *Mohan Lal (supra)*, in a similar case, in which, too, coincidentally, the IO/complainant happened to be Anju Singh, and learned counsel for the opposing parties, too, were the same, namely Ms. Sidhu and Mr. Satish Aggarwala. (Significantly, in the said case, too, there were two public witnesses, who, however, testified, during trial, in favour of the DRI.) I take the liberty of reproducing, from the said decision [*Anabelle Analista Malibago v. DRI, 2018 SCC Online Del 12114*], the following passages:

“2. Ms. Inderjeet Sidhu, appearing on behalf of the appellant, restricts her submission to one single ground, viz. that the entire proceedings were vitiated as the Investigating Officer (hereinafter referred to as the “IO”) was herself the complainant, who had submitted/filed the written complaint, wherefrom these proceedings emanated. She relies on a recent judgment of the Supreme Court, rendered by a Bench of three

Hon'ble Judges, in *Mohan Lal v. State of Punjab, 2018 SCC OnLine SC 974*.

3. Arguing *per contra*, on behalf of the Directorate of Revenue Intelligence (hereinafter referred to as “DRI”), Mr. Satish Aggarwala, learned counsel, would seek to distinguish the judgment in *Mohan Lal (supra)* on the ground that the said judgment held the proceedings to be vitiated where the *informant* was the IO, and not where the *complainant* was the IO. He submits that there is a distinction between an “informant” and a “complainant”, and that the cases investigated by the DRI are based, not on information, but on intelligence sourced by the DRI and the documents recovered pursuant thereto. He submits that, where the seizing officer was the complainant, as in the present case, the proceedings were not vitiated and *Mohan Lal (supra)* would not apply. He draws my attention to the contents of the complaint, and to the contentions advanced by him in his written submissions before the learned ASJ.

4. Ms. Sidhu, in rejoinder, submits that the distinction, sought to be drawn by Mr. Aggarwala, between an informant and a complainant, is a distinction without a difference, in cases relating to prosecution under the NDPS Act, as the source of intelligence was not known in such cases. Besides, she submits that a holistic reading of *Mohan Lal (supra)* reveals that it covers cases where the informant was the IO, as well as cases where the complainant was the IO. She, therefore, reiterates her reliance on *Mohan Lal (supra)*.

10. Insofar as the applicability of *Mohan Lal (supra)* is concerned, Mr. Aggarwala, as already noted hereinabove, seeks to distinguish the said case by drawing my attention to the distinction between an “informant” and a “complainant”, and that in cases investigated by the DRI, there was no “informant”, as the cases proceeded on prior intelligence, and that the seizing officer was the complainant. He submits that there is no prohibition to the seizing officer being the complainant and that if, therefore, the seizing officer, who also investigated the case, happened to file the complaint, against the appellant-accused in court, no illegality, warranting a

decision in favour of the accused, could be said to have been committed.

11. Mr. Satish Aggarwala has also filed written submissions, in which, besides advancing the legal arguments already noted hereinabove, it has been sought to be contended that Ms. Anju Singh was neither the informant nor the investigating officer, as “almost the entire investigation” had been conducted by PW-4 Ramesh Kumar, Senior Intelligence Officer (SIO). My attention has been invited, in this context, to the testimonies of Anju Singh and Ramesh Kumar, testified as PW-1 and PW-4 respectively. The filing of complaint by Anju Singh, it is sought to be contended in the written submissions, was only by way of discharge of her official duties.

12. Before examining the rival contentions, it would be appropriate to peruse the judgment of the Supreme Court in ***Mohan Lal (supra)***, which constitutes the sheet-anchor, and the *summum bonum*, of the appellant's case.

13. ***Mohan Lal v. State of Punjab, 2018 SCC Online SC 974***

14. The proceedings, in ***Mohan Lal (supra)*** commenced from an FIR, lodged on 3rd February, 1997 by PW-1 Chand Singh, Sub-Inspector, who alleged that, while on patrol duty in the company of other officers of the police station, they saw ***Mohan Lal*** and, on entertaining doubts, called Mr. Rajinder N. Dhoke, a gazetted IPS officer and, in his presence, searched ***Mohan Lal***, leading to recovery of 4 kg of opium in a bag carried by him. The matter proceeded, inexorably, to his incarceration, trial and eventual conviction.

15. Based on the contentions advanced before it, the Supreme Court delineated the “primary question” arising for its consideration, in para 5 of the judgment, “whether in a criminal prosecution, it will be in consonance with the principles of natural justice, fair play and a fair investigation, if the informant and the investigating officer were to be the same person”. Additionally, the Supreme Court examined whether, in such a case, it was “necessary for the accused to demonstrate prejudice, especially under laws such as NDPS Act, carrying a reverse burden of proof”.

16. On the “reverse burden of proof” cast by the NDPS Act, the Supreme Court ruled, in para 13 of its judgment thus:

“13. 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.”

17. Thereafter, the prime necessity of the investigation, in cases under the NDPS Act being scrupulously fair and free from any objectionable features or infirmities, was highlighted in paras 14 to 16 of the judgment, thus:

“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, 1992 Supp (1) SCC 222 : AIR 1991 SC 1260*** 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.”

16. The duty of the prosecution under the NDPS Act, considering the reverse burden of proof, was noticed in *Noor Aga v. State of Punjab, (2008) 16 SCC 417* 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.”

18. The Supreme Court, thereafter, went on to examine the implication of the IO, carrying out investigation under the NDPS Act, being the informant, *as well as being the complainant*, in paras 18 to 31 of the decision, thus:

“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, *who makes the allegations himself*, is 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 PW6 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, PW5 *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 PW6, 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) shim LC 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. 1688SB 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 21 (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 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, 22 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 Cri LJ 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 not 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.”

(Emphasis and underscoring supplied)

19. The opening words of para 31 of the judgment make it apparent that, prior thereto, there was considerable divergence of judicial opinion, amongst decisions of various benches, in each case of two Hon'ble judges of the Supreme Court, regarding the issue of whether the fact that the informant/complainant/searching officer, was the IO, was fatal to the prosecution, especially in cases where the statute casts a reverse burden of proof. Needless to say, this Court is loath to revisit the issue and, thereby, undo the efforts of the Supreme Court, as manifested by the judgment in ***Mohan Lal (supra)***, which sets the legal position at rest. For the nonce, at least, this Court is sanguine about the position, in law, that all prosecutions, under the NDPS Act - or, for that matter, under any “criminal” statute which casts a reverse burden of proof - must abide by the enunciation of the law in ***Mohan Lal (supra)***.

20. Another feature which becomes apparent, from the underscored words in the above extracted passages from ***Mohan Lal (supra)***, is that they apply, not only to a situation in which the IO is the informant, but also to a situation in which the IO is the complainant or even, for that matter, the searching officer.

21. With those prefatory remarks, the following principles may justifiably be said to emerge, from the judgment in ***Mohan Lal (supra)***, insofar as the effect, on prosecutions under the NDPS Act, of the IO being the informant, complainant or searching officer, is concerned:

- (i) In every criminal prosecution, it was essential that the investigation, on the face of it, had to be free,

judicious and just, and that it had also to appear to be so, eschewing any conduct or impression which may give rise to a real and genuine, and not a mere fanciful, apprehension, in the mind of the accused, that the investigation was not fair.

(ii) If, therefore, the informant police official in a criminal prosecution, especially one which carries a reverse burden of proof, *who had made the allegations*, was himself asked to investigate, serious doubts would naturally arise with regard to his fairness and impartiality.

(iii) Actual proof of bias was not required in such a case. It would be illogical to presume and contrary to normal human conduct, that the IO would, in such a case, conclude the investigation with a closure report, which would mean that he had falsely implicated the petitioner and would result in attendant consequences on the complainant himself.

(iv) In *Megha Singh v. State of Haryana, (1996) 11 SCC 709*, it had been held that the Head Constable, *being the complainant himself, could not have proceeded with the investigation*, and such a practice was one which should not be resorted to, so that there can be no occasion to suspect the fairness and impartiality of the investigation.

(v) Following the law laid down in *Megha Singh (supra)*, the Supreme Court had, in *State v. Rajangam, (2010) 15 SCC 369*, acquitted the accused, in a case under the NDPS Act, on the ground that the officer *who apprehended the accused* could not have investigated the case. The Supreme Court also affirmed the view taken by the Madras High Court in *Balasundaran v. State, 1999 (113) ELT 785 (Mad.)*, which held that the person *who had searched the appellants* could not be the investigating officer.

(vi) In *Naushad v. State of Kerala, 2000 (1) KLT 785*, it was categorically held by a learned Single Judge of the Kerala High Court, in a case relating to the

NDPS Act that “the complainant being a police officer cannot be an investigating officer” as, “in such case, the accused and the prosecution will be deprived of their valuable rights of contradicting and corroborating, the previous information recorded under Sections 154 or 155 of CrPC and previous statement of the witness, being a police officer, complaint recorded, under Section 161 CrPC enjoined in Section 145 and 157 of the Indian Evidence Act and proviso of Section 162 CrPC”. The fact that the complainant was the investigating officer was held, by the learned Single Judge of the High Court of Kerala, to constitute an “incurable infirmity”, entitling the petitioner to an order of acquittal. The said judgment of the learned Single Judge in *Naushad (supra)* stands specifically approved in *Mohan Lal (supra)*, which overrules the contrary view, expressed by a Division Bench of the High Court of Kerala, in *Kader (supra)*. The view of the learned Single Judge of the High Court of Kerala in *Naushad (supra)* stands, thereby, elevated to the status of the opinion of a bench of three Hon'ble judges of the Supreme Court.

22. A holistic reading of *Mohan Lal (supra)*, in my view, leaves no manner of doubt that the Supreme Court has disapproved, in cases relating to prosecution under the NDPS Act, not only the informant being the IO, but also the complainant, the officer who apprehends the accused, or the officer who conducts the search, being the IO. The reasons, for taking such a view are also clearly delineated in the said decision. The Supreme Court has clearly expressed a view that, if the person making the allegations is himself asked to investigate, serious doubts would arise with regard to his fairness and impartiality. It has also noted that it would be illogical to presume, and contrary to human conduct, to expect the IO, who had himself provided the initial information, or filed the complaint against the accused before the competent court, or even conducted the apprehension or search of the accused, to, at the conclusion of the investigation, submits a closure report, which could invite an inference that he had obviously implicated the accused, with all its attendant consequences, “for the complainant himself”. While limiting the earlier judgment in *Megha Singh (supra)* to its own facts, the Supreme Court also held that the complainant could not be

the IO, and that such a practice was inherently pernicious in nature. ***Rajangam (supra)*** which arose under the NDPS Act, also stated that the officer who apprehended the accused could not have investigated the case. The judgment of the learned Single Judge of the Kerala High Court in ***Naushad (supra)***, which stands affirmed by the Supreme Court in ***Mohan Lal (supra)***, too, affirms the same view.

23. In view of the above, the submission, of Ms. Sidhu, to the effect that, if the complainant, who has filed the complaint in a case relating to prosecution under the NDPS Act, was herself/himself the IO, the entire investigation and subsequent prosecution and trial stand vitiated, and that the accused is entitled, *ipso facto*, to acquittal, merits acceptance.”

19. As one may say, *quod erat demonstrandum*. As in the case of ***Anabelle Analista Malibago (supra)***, the proceedings, in the present case, too, stand completely vitiated even by the sole reason of the fact that PW-1 Anju Singh was IO, as well as complainant.

20. There is substance in the second contention of Ms Sidhu, as well, i.e. that the non-co-opting, of Harendra and Vishal, supposedly the two public witnesses to the search, recovery and seizure of the contraband heroin from the appellant, as witnesses for the prosecution, necessarily invites an inference adverse to it. The reliance, by Ms Sidhu, in this context, on the judgments of this Court in ***Anju Tiwari (supra)*** and ***Nnadi K. Iheanyi (supra)***, is apt and to the point. The situation, in the said cases, was identical, and this Court (speaking, in each case, through Dr S. Muralidhar, J.), held that the failure to produce the public witnesses, as witnesses for the prosecution, on the ground that the addresses provided by them were found to be non-existent, was fatal to the case of the prosecution. This Court, in fact, noticed that this seemed to be an endemic problem, with the NCB.

21. Para 23 of the judgment in *Anju Tiwari (supra)* reads thus:

“ The Court would like to observe that conviction cannot depend only on the fact that a huge quantity of heroin is shown to have been seized. Also, the argument that the prosecution will not needlessly implicate innocent persons does not impress the Court. The NCB has to discharge the burden of proving beyond reasonable doubt that it is the Respondents were guilty of the offences with which they have been charged. *Since the NCB has presented a version in which independent witnesses are stated to have participated throughout the raid, the NCB has to satisfactorily explain how and why the addresses given for such witnesses has turned out to be non-existent and they have not been produced in Court. No effort appears to have been made by the NCB to ascertain the correct addresses and summon the independent witnesses. That was not the responsibility of the Court. In the circumstances, the only inference that was possible to be drawn was that the said witnesses and their addresses did not exist.*”

(Emphasis supplied)

22. *Nnadi K. Iheanyi (supra)*, in a similar vein, holds thus:

“30. In a large number of cases involving the NCB, there is a failure to produce the panch witness named. There are cases where panch witnesses are not associated at all and it is sought to be explained by the prosecution that despite its request no person from the public came forward to join in the raid. The latter explanation has been accepted by some Courts by taking judicial notice of the fact that the members of the public are generally reluctant to be involved in criminal cases as witnesses. *However, in a case where the NCB specifically names a public witness as being associated in the arrest and seizure, its failure to produce such person for cross-examination must be specifically explained by it.*

31. *In the present case the failure to produce the public witness was attributable to a false address given for the*

witness. This raises serious doubts as to whether such a witness existed at all. It will amount to falsification of the trial Court record if the thumb impression on the arrest and seizure memo is attributed to a witness who is not able to be produced and it is shown that the address given for him, even in the first instance in the summons issued by NCB, was false. This casts serious doubts on the trustworthiness of the prosecution version and in that circumstance the benefit of doubt should certainly go to the accused.”

(Emphasis supplied)

23. The submissions of Mr. Satish Aggarwala fail, entirely, to address this aspect of the matter. The only fallback argument, if one may so term it, of Mr. Aggarwala, is that co-opting of public witnesses is not necessary, under the NDPS Act. To that proposition, there can be no dispute. Indeed, the decision in *Nnadi K. Iheanyi (supra)* itself notices this legal proposition, and correctly observes that the basis, therefor, is that public witnesses rarely prefer to be embroiled in a criminal investigation. If, however, the case of the prosecution is that such “co-operative” public witnesses were available, and that they had been invited to, and involved in, the investigations, the failure, on the part of the prosecution, to produce them as witnesses, necessarily dents its case, and dents it badly.

24. The above submissions of Ms. Sidhu being, therefore, covered, in her favour – and in favour of her client, i.e. the appellant in the present case – by authoritative pronouncements of the Supreme Court as well as this Court, the appellant is entitled, on the basis thereof, to acquittal, of the charges against her.

Conclusion

25. In view of the above discussion, the appeal is allowed. The appellant is acquitted of the charges against her. The impugned judgment, dated 12th February, 2014, as well as the subsequent order on sentence, dated 17th February, 2014, of the learned Special Judge, are quashed and set aside.

26. The appellant is, accordingly, directed to be released forthwith, unless her detention is required in connection with any other case.

27. Trial court record be returned.

C. HARI SHANKAR, J.

NOVEMBER 27, 2018/HJ