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

Reserved on: 29th September, 2018
Date of decision: 16th October, 2018

+ CRL. A. 676/2016

RAM GOPAL

Through Appellant
Ms. Saahila Lamba, Advocate
(DHCLSC)

versus

STATE

Through Respondent
Mr. Ravi Nayak, APP for the
State with ASI Sanjay and
Inspector Rajnikant, Narcotics
Cell/Crime Branch

CORAM:

HON'BLE MR. JUSTICE NAVIN CHAWLA

1. The present appeal challenges the Judgment dated 24.05.2016 passed by the Special Judge (NDPS-02) Central District, Tis Hazari, Delhi in Sessions Case No.20/2012 convicting the Appellant under Section 21(c) of the Narcotic Drugs and Psychotropic Substances Act, 1985 (hereinafter referred to as the 'Act'). The appeal further challenges the order dated 26.05.2016 passed by the Special Judge sentencing the Appellant to undergo Rigorous Imprisonment for 12 years and to pay a fine of Rs.2 lacs, and in default, to undergo Simple Imprisonment for six months for the above offence.

2. The case of the prosecution is that on 07.11.2011 one secret informer came to Inspector Satyawar (PW-10) and informed that one person, namely, Ram Gopal and his mother Smt Kamla collect heroin from Mandor, MP and supply the same in the area of Delhi and Haryana. It was further stated by the secret informer that on that day they both would come near the main gate of the St. Stephens Hospital to deliver heroin to someone between 2:30 pm and 3:30 pm and they can be arrested if a raid is conducted. Inspector Satyawar produced the secret informer before Inspector Kuldeep in his office, who also inquired from the secret informer and after he was satisfied, he further informed ACP/N&CP, Sh. Veer Singh telephonically at his residence. The ACP then instructed to conduct the raid and proceed as per law. Inspector Satyawar reduced the secret information into writing vide DD No. 12 (Ex PW3/A) and produced the copy of the same before Inspector Kuldeep. As per the directions of Inspector Kuldeep, he constituted a raiding party comprising of himself, Ct. Kheta Ram, HC Jagdish and WHC Rani Reddy. Thereafter, Inspector Satyawar left Shakarpur Branch along with raiding party and secret informer in a Government Gypsy no.DL-ICM-4228 being driven by HC Rajender at 2PM, vide DD no. 13 (Ex PW10/A). On the way, 4-5 public persons/passersby were asked to join the investigation but they did not join the same after showing difficulties and left without telling their names and addresses. At 2:30PM, the police party reached at the spot, that is, main gate of St. Stephens Hospital and took their position. The nakabandi was held at 2:35 PM. They waited for Ram Gopal and his mother's arrival. At about 2:50 PM one

person, wearing Fauji colour clothes came from the side of Khanna Market on foot. That person was carrying a green and yellow colour bag in his left hand. The secret informer had pointed out that person as Ram Gopal. Thereafter the secret informer had left the spot. Ram Gopal reached near the staircase of the foot over bridge, near the main gate of St. Stephens Hospital and he started waiting near the staircase. He waited there for 7-8 minutes and thereafter he started to go, however, immediately that person, that is, Ram Gopal, was overpowered by the police party. Inspector Satyawar introduced himself as well as the members of raiding party to that person. Signal was given to the driver to bring the vehicle and the driver brought the vehicle near the spot. Inspector Satyawar informed the accused that he has secret information regarding supply of heroin by accused in the area of Delhi and Haryana and that, on the said day, he has reached there to supply heroin to someone and that there was a chance of recovery of heroin from the possession of the accused and for that his search was required. Inspector Satyawar also informed the accused regarding his legal right that before his search is taken, some gazetted officer or a Magistrate can be arranged for that purpose. It was also informed to the accused by Inspector Satyawar that he has a legal right to take the search of the police and the government vehicle before giving his search. Notice under Section 50 of the Act was served upon the accused. The carbon copy of the notice was handed over to the accused. The original notice is Ex.PW7/A. The accused, however, refused to exercise his legal right. The reply of the accused is Ex. PW7/B. The bag was taken from the

accused. In the bag, one shawl and sweater were found and under these articles, one transparent polythene containing some substance was found. It contained a matiala coloured substance and same was taken out from the bag. The mouth of the polythene had been tied with a rubber band, which was removed and the recovered substance was checked with the help of a field testing kit. It was found to be heroin. On weighing, it was found to be 2 kg 200 gm, alongwith the transparent polythene. Two samples of 5gm each were separated from the recovered contraband and put in two small transparent polythenes, the mouths of which were tied with a rubber band and thereafter, both the transparent polythenes containing the heroin were converted into cloth parcel and marked as 'Mark A' and 'Mark B'. The remaining contraband alongwith the polythene was kept in the same bag alongwith shawl and sweater and a cloth pulanda was prepared and same was marked as 'Mark C'. Form FSL was also filed up. Pulanda Mark A, B and C and FSL form were sealed with the seal of 7BPS NB DELHI by the Inspector. Only one seal each was put on the pulandas and FSL form. The seal after use was handed over to HC Jagdish. The case property was taken into possession vide memo Ex.PW7/C. Thereafter, the Inspector prepared rukka Ex PW10/B and handed over the same to Ct. Kheta Ram for registration of FIR at PS Crime Branch. The copy of seizure memo alongwith case property, that is, pulanda Mark A, B, C and Form FSL was handed over to Ct. Kheta Ram.

3. At about 8:30 PM SI Rajbir Singh alongwith driver of the vehicle came at the spot in the aforesaid vehicle. He prepared the site

plan Ex. PW4/A at the instance of SI Satyawar and recorded the statement of HC Jagdish Rana. He arrested the accused vide arrest memo Ex.PW4/B. He conducted personal search of the accused vide memo Ex. PW4/C. The accused made a disclosure statement which is, Ex.PW4/E. He produced the accused before Inspector Kuldeep, Inspector Narcotics who interrogated the accused and verified the facts. SI Rajbir made DD entry No. 2, Ex.PW4/F. On 08.11.2011, he prepared a report under Section 57 of the Act, which is Ex. PW4/G. On 14.11.2011, the sealed sample of this case FIR was sent to FSL through Ct. Satpal. After completion of the investigation, charge sheet was filed in the court. During the trial the FSL report Ex. PW4/H was also collected. The FSL report found the seized material to contain Diacetylmorphine 22.45%.

4. The Trial Court by way of Impugned order, relying upon the testimonies of the witnesses produced by the prosecution, has found the Appellant to be guilty of offence under Section 21(c) of the Act.

5. Learned counsel for the Appellant, relying upon the judgment dated 16.08.2018 passed by the Supreme Court in Criminal Appeal No.1880/2011, ***Mohan Lal v. The State of Punjab***, submits that in the present case the Informant/Complainant and the Investigating Officer were the same person, that is, PW-10 Inspector Satyawar and this is fatal to the case of the prosecution. She submits that the right to fair investigation being the very foundation of fair trial, the Informant and Investigating Officer cannot be the same person and the entire prosecution case is vitiated because of the infraction of the constitutional guarantee of a fair investigation in the present case.

6. I have considered the submission made by the learned counsel for the Appellant, however, I am unable to agree with the same. It is true that in the present case PW-10 Inspector Satyawar is shown as the informant in the FIR, however, the FIR also records that the investigation was carried out by SI Rajbir Singh (PW-4). Even otherwise, above narrated case of the prosecution clearly shows that on information being received by PW-10 Inspector Satyawar, who at the relevant time was posted in the Narcotics Cell, Shakarpur as Sub-Inspector, he conveyed the information to Inspector Kuldeep (PW-9) and produced the secret informer before him. PW-9 thereafter directed the formation of a raiding party of which PW-10 was a part. The raiding party duly confronted the Appellant and on search of the bag carried by the Appellant, the Narcotic (Heroin) substance was recovered. The sample were drawn and sealed by PW-10 who thereafter prepared rukka (Ex.PW-10/B) and sent to the Police Station through Ct.Kheta Ram (PW-7) for registration of FIR at Police Station Crime Branch. On registration of FIR, the investigation of the case was handed over to Sub-Inspector Rajbir (PW-4) who visited the spot, took the custody of the documents and the accused, prepared the site plan, recorded the statement of HC Jagdish Rana, interrogated the Appellant and arrested him, recorded his disclosure statement and carried out further investigation in the case. Therefore, while PW-10 Inspector Satyawar was the Informant, PW-4 Sub-Inspector Rajbir Singh was the Investigating Officer in the case.

7. In **Mohan Lal** (supra) PW-1 Chand Singh, SI of Balianwali PS was not only the Informant/Complainant but was also the Investigating Officer. It was in those facts that the Supreme Court held as under:

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

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*24. The view taken by the Kerala High Court in **Kader** (supra) does to meet our approval. It tantamounts to holding that the F.I.R. was a gospel truth, making investigation an empty formality if not a farce. The right of the accused to a fair investigation and fair trial guaranteed under Article 21 of the Constitution will stand negated in that event, with arbitrary and uncanalised powers vested with the police in matters relating to the NDPS Act and similar laws carrying a reverse burden of proof. An investigation is a systemic collection of facts for the*

*purpose of describing what occurred and explaining why it occurred. The word systemic suggests that it is more than a whimsical process. An investigator will collect the facts relating to the incident under investigation. The fact is a mere information and is not synonymous with the truth. **Kader** (supra) is, therefore, overruled. We approve the view taken in **Naushad** (supra).*

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

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

8. As observed by the Supreme Court, the investigation is a systemic collection of facts for the purpose of describing what

occurred and explaining why it occurred. In the present case, this burden has been discharged by the PW-4 Sub-Inspector Rajbir Singh and not by Inspector Satyawar. Inspector Satyawar was merely discharging the duty under Section 43 of the Act and thereafter the investigation had been handed over to PW-4 Sub-Inspector Rajbir Singh. In my view, therefore, no infirmity can be found in the case of the prosecution on this account.

9. Learned counsel for the Appellant, relying upon the judgment dated 27.04.2018 passed by the Supreme Court in Criminal Appeal No.273/2007, *Arif Khan @ Agha Khan v. State of Uttarakhand*, submits that in the present case the alleged search and recovery made from the Appellant does not satisfy the mandatory requirement of Section 50 of the Act and is therefore, fatal to the case of the prosecution. Section 50 of the Act is reproduced hereinbelow:

“50. Conditions under which search of persons shall be conducted.-

(1) When any officer duly authorised under section 42 is about to search any person under the provisions of section 41, section 42 or section 43, he shall, if such person so requires, take such person without unnecessary delay to the nearest Gazetted Officer of any of the-departments mentioned in Section 42 or to the nearest Magistrate.

(2) If such requisition is made, the officer may detain the person until he can bring him before the Gazetted Officer or the Magistrate referred to in sub- section (1).

(3) The Gazetted Officer or the Magistrate before whom any such person is brought shall,- if he sees no reasonable ground for search, forthwith discharge the person but otherwise shall direct that search be made.

(4) No female shall be searched by anyone excepting a female.

[(5) When an officer duly authorised under Section 42 has reason to believe that it is not possible to take the person to be searched to the nearest Gazetted Officer or Magistrate without the possibility of the person to be searched parting with possession of any narcotic drug or psychotropic substance, or controlled substance or article or document, he may, instead of taking such person to the nearest Gazetted Officer or Magistrate, proceed to search the person as provided under section 100 of the Code of Criminal Procedure. 1973 (2 of 1974)]

(6) After a search is conducted under sub-section (5), the officer shall record the reasons for such belief which necessitated such search and within seventy two hours send a copy thereof to his immediate official superior.”

10. In ***Vijaysinh Chandubha Jadeja v. State of Gujarat***, (2011) 1 SCC 609 the Supreme Court, while approving the earlier judgment of the Constitution Bench of the Supreme Court in ***State of Punjab v. Baldev Singh***, (1999) 6 SCC 172, held as under:

“29. In view of the foregoing discussion, we are of the firm opinion that the object with which the right under Section 50(1) of the NDPS Act, by way of a safeguard, has been conferred on the suspect viz. to check the misuse of power, to avoid harm to innocent persons and to minimise the allegations of planting or foisting of false cases by the law enforcement agencies, it would be imperative on the part of the empowered officer to apprise the person intended to be searched of his right to be searched before a gazetted officer or a Magistrate. We have no hesitation in holding that insofar as the

obligation of the authorised officer under sub-section (1) of Section 50 of the NDPS Act is concerned, it is mandatory and requires strict compliance. Failure to comply with the provision would render the recovery of the illicit article suspect and vitiate the conviction if the same is recorded only on the basis of the recovery of the illicit article from the person of the accused during such search. Thereafter, the suspect may or may not choose to exercise the right provided to him under the said provision.

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31. We are of the opinion that the concept of “substantial compliance” with the requirement of Section 50 of the NDPS Act introduced and read into the mandate of the said section in Joseph Fernandez and Prabha Shankar Dubey is neither borne out from the language of sub-section (1) of Section 50 nor it is in consonance with the dictum laid down in Baldev Singh. Needless to add that the question whether or not the procedure prescribed has been followed and the requirement of Section 50 had been met, is a matter of trial. It would neither be possible nor feasible to lay down any absolute formula in that behalf.”

11. The Supreme Court therefore, has held that while the obligation of the authorised officer under Section 50(1) of the Act is mandatory and requires strict compliance, the suspect may or may not choose to exercise the right provided to him under the said provision. It was further held that the question whether or not the procedure prescribed under Section 50(1) of the Act has been followed and the requirement prescribed therein has been met, is a matter of trial.

12. In the present case, PW-7 Ct.Kheta Ram, PW-8 HC Jagdish and PW-10 Inspector Satyawar have duly proved the service of mandatory notice under Section 50 of the Act (Ex.PW7/A) on the Appellant and refusal of the Appellant to exercise his legal right to be searched before a Gazetted Officer or the Magistrate, in his own handwriting (Ex.PW7/B). In the statement of the Appellant recorded under Section 313 Cr.P.C., the Appellant had not denied his reply in Ex.PW7/B. Therefore in my opinion, the requirement of Section 50(1) of the Act has been duly complied with by the prosecution.

13. In *Arif Khan* (supra) on the facts of that case, the Court found that the mandatory procedure under Section 50 of the Act had not been satisfied. The said case was peculiar on its own facts and therefore, is distinguishable from the facts of the present case. In the present case, the prosecution has been able to prove its case through the testimonies of its witnesses and the documents produced on record.

14. I, therefore, find no merit in the present appeal and the same is accordingly dismissed.

15. The Trial Court Record be sent back.

16. A Copy of this judgment be supplied to the Appellant through the concerned Jail Superintendant.

NAVIN CHAWLA, J

OCTOBER 16, 2018/Arya