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

Date of Decision: 21st September, 2023

+ W.P.(C) 3840/2012 and CM APPL. 13760/2014, 23429/2015, 15955/2017, 15956/2017, 26380/2019, 26381/2019, 26408/2019, 30356/2019, 30357/2019, 30358/2019 & 15030/2020

MANISH KUMAR KHANNA

..... Petitioner

Through: Mr. Uday Gupta, Mrs. Shivani M. Lal, Mr. M.K. Tripathi and Ms. Shubhangi Tiwari, Advocates.
Ms. Rebecca M. John, Sr. Advocate, Amicus Curiae with Mr. Chinmay Kanojia, Mr. Pravir Singh, Ms. Anushka Baruah and Mr. Nilanjan Dey, Advocates.

versus

DIRECTORATE OF REVENUE INTELLIGENCE & ORS.

..... Respondents

Through: Mr. Satish Aggarwala, Senior Standing Counsel for respondent No.1/ DRI with Mr Gagan Vaswani, Advocate.
Mr. Subhash Bansal, Sr. Standing Counsel, NCB with Mr. Shaashwat Bansal, Advocates.
Mr. R.K. Mittal, Mr. Yogesh Kumar, Ms. Bharti Kapil, Advocates.
Mrs. Avnish Ahlawat, SC, GNCTD with Mrs. Taniya Ahlawat, Mr. Nitesh Kumar Kaushik, Ms. Laavanya Kaushik, Ms. Aliza Alam and Mr. Mohnish Sehrawat, Advocates for R-2 and R-3.



CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SANJEEV NARULA
JUDGMENT

SANJEEV NARULA, J. (Oral):

1. Witnesses are the 'eyes and ears' of justice system and they discharge the sacred duty of assisting the Court in the discovery of the truth by providing crucial evidence. The present Public Interest Litigation (PIL) by a practicing advocate, appearing in prosecutions under Narcotic Drugs and Psychotropic Substances Act, 1985 ("NDPS Act") brings to our attention a concerning practice which shakes the foundations of the justice system. He has pointed out that a sizable number of independent witnesses cited in various NDPS cases are not examined, leading to a decline in the rate of convictions and, inevitably, denting the credibility of our legal system. The core of the allegation posits that central investigative agencies purportedly utilises non-existent independent witnesses during the recovery of narcotic drugs and psychotropic substances. The officials of the Respondent consistently cite these independent witnesses in the charge-sheets for prosecutions under the NDPS Act, however, they subsequently fail to appear in court and are thus rendered unavailable for cross-examination. The prosecution relies on these statements nonetheless, by virtue of Section 53A of the NDPS Act, which purportedly makes these statements legally admissible as evidence of recovery against the accused.
2. The Petitioner primarily seeks the establishment of guidelines and procedures to address instances where statements of independent witnesses,



recorded under Section 67 of the NDPS Act, are procured through dubious means.

3. By anchoring his argument on an RTI response dated 3rd May, 2012 (“**Response**”), which sheds light on the status of independent witnesses in ongoing NDPS cases presided over by Shri M.K. Nagpal, NDPS/Special Judge, at Saket Courts, New Delhi. Of the 55 cases being heard by the Special Judge, there were 29 instances where both independent witnesses cited by the Directorate of Revenue Intelligence (“**DRI**”) (Respondent No. 1) were dismissed during the trial phase. The justification, as recorded by the Investigating Officer (“**IO**”) and duly noted by the Special Court, is either the inability to locate the witness at the provided address or that the said address itself is incorrect or incomplete. In a dozen cases, one out of the two aforementioned witnesses was omitted. A mere 7 cases saw the examination of both of the independent witnesses cited, whereas the remaining nine cases were either yet to proceed to the stage where witnesses are summoned, or the examination was postponed due to specific reasons. The Petitioner highlights an intriguing pattern: every single witness by the name ‘Ashok’ mentioned in the Response was excluded by the prosecution.

4. The Petitioner has filed statements of four witnesses, documented under Section 67 of the NDPS Act in the cases titled ***DRI v Samson Chukwudi*** and ***DRI v Samson Onegra***. Scrutinizing these statements unveils the following observations: a) Out of the four witnesses, three — Ashok Kumar (aged 33), Vinod Kumar (aged 27), and Raju (aged 35) — all claim Ram Kumar as their father and purport to reside at House No. C 56A, Mandawali Fazalpur, Delhi. Furthermore, Ashok Kumar and Vinod Kumar identify ancestral roots in Jagson village. From this, it is logical to deduce



that they are most likely siblings. b) There is a noticeable inconsistency among their claims. While Ashok Kumar and Vinod Kumar contend that they have six other brothers, with three residing in the same house, Raju asserts that he has five siblings in total. This includes two brothers named Ashok Kumar and Vinod Kumar, both of whom, he claims, share a residence with him in Delhi, along with a sister. The Petitioner underscores this divergence in their accounts, suggesting that these might not be genuine individuals. c) Their narratives converge on the point that, on two distinct occasions, they were near the Ring Road, ITO, when DRI officials approached, soliciting their participation as witnesses in imminent recovery operations. d) According to the aforementioned Response, attempts to locate or contact Ashok Kumar and Vinod Kumar at the specified address yielded no results, rendering them untraceable. Similarly, Raju's whereabouts remained elusive. As a consequence, these three individuals were omitted as witnesses during the trial stages of both cases.

5. The Petitioner thus draws focus to the recurring trend of these so-called 'independent' witnesses being dropped. Coupled with the analogous yet occasionally contradictory statements provided by these witnesses, he infers either their non-existence or, at the very least, their role as generic placeholder witnesses.

Pertinent Issues and Observations

6. Given the significance of the concerns raised by the Petitioner, this Court deemed it prudent to engage the expertise of senior counsel Mrs. Rebecca John and Mr. Dayan Krishnan, appointing them as *amici curiae* through order dated 27th November, 2014. Their aid to the Court was



instrumental in navigating the intricacies of the petition. They have rendered exemplary service by offering comprehensive submissions, encapsulating the pertinent statutory framework and scrutinizing the legitimacy of such methods employed by different investigative agencies in NDPS cases. We express our appreciation for their commendable contributions, which have been instrumental in elucidating the matter before us. We shall briefly examine the issues delineated in the current petition, drawing insights from their submissions.

7. As discussed above, we are focusing on the issue of citing ‘fictitious’ witnesses by the various investigation agencies in NDPS cases during prosecution and investigation regarding seizure of narcotics and psychotropic substances. The allegation is that the officials of agencies such as DRI, NCB, etc. fabricate Section 67 statements. The section has been reproduced below for convenience:

Section 67. Power to call for information, etc.

Any officer referred to in section 42 who is authorised in this behalf by the Central Government or a State Government may, during the course of any enquiry in connection with the contravention of any provision of this Act,--

(a) call for information from any person for the purpose of satisfying himself whether there has been any contravention of the provisions of this Act or any rule or order made thereunder;

(b) require any person to produce or deliver any document or thing useful or relevant to the enquiry;

(c) examine any person acquainted with the facts and circumstances of the case

8. The Petitioner contends that these fictitious ‘independent’ witnesses do not appear in Court, and therefore, cannot be cross-examined. In this situation, the prosecution relies on Section 53A¹ of the NDPS Act, which

¹ Section 53A. Relevancy of statements under certain circumstances.

(1) A statement made and signed by a person before any officer empowered under section 53 for the



provides legal admissibility of these witness statements as evidence of recovery of narcotics and psychotropic substances against the accused.

9. There are sufficient provisions in place in the present legal framework which would deal with situation highlighted by the Petitioner, e.g., Section 118 of the Evidence Act, which empowers the Court to exclude testimonies from certain witnesses. Significantly, during the pendency of this writ petition, the Supreme Court has passed a judgment comprehensively dealing with the evidentiary value of Section 67 statements in *Tofan Singh v. State of Tamil Nadu (2021) 4 SCC 1*. The majority opinion holds that powers of Section 67 must strictly be exercised in conjunction with Section 42², and

investigation of offences, during the course of any inquiry or proceedings by such officer, shall be relevant for the purpose of proving, in any prosecution for an offence under this Act, the truth of the facts which it contains,

(a) when the person who made the statement is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or whose presence cannot be obtained without an amount of delay or expense which, under the circumstances of the case, the court considers unreasonable; or

(b) when the person who made the statement is examined as a witness in the case before the court and the court is of the opinion that, having regard to the circumstances of the case, the statement should be admitted in evidence in the interest of justice.

(2) The provisions of sub-section (1) shall, so far as may be, apply in relation to any proceedings under this Act or the rules or orders made thereunder, other than a proceeding before a court, as they apply in relation to a proceeding before a court.

² Section 42 - Power of entry, search, seizure and arrest without warrant or authorisation

(1) Any such officer (being an officer superior in rank to a peon, sepoy or constable) of the departments of central excise, narcotics, customs, revenue intelligence or any other department of the Central Government including paramilitary forces or armed forces as is empowered in this behalf by general or special order by the Central Government, or any such officer (being an officer superior in rank to a peon, sepoy or constable) of the revenue, drugs control, excise, police or any other department of a State Government as is empowered in this behalf by general or special order of the State Government, if he has reason to believe from persons knowledge or information given by any person and taken down in writing that any narcotic drug, or psychotropic substance, or controlled substance in respect of which an offence punishable under this Act has been committed or any document or other article which may furnish evidence of the commission of such offence or any illegally acquired property or any document or other article which may furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act is kept or concealed in any building, conveyance or enclosed place, may between sunrise and sunset,--

(a) enter into and search any such building, conveyance or place;

(b) in case of resistance, break open any door and remove any obstacle to such entry;

(c) seize such drug or substance and all materials used in the manufacture thereof and any other article and



the joint reading of the two sections provides that Section 67 statements are only relevant for the purposes of gathering information prior to the investigation, forming a ‘reason to believe’ (Section 42(1)) that an offence has been committed, and by no stretch of imagination, be equated to a confessional ‘statement’ obtained under Section 161 of Code of Criminal Procedure, 1973 (“**CrPC**”). Furthermore, the Supreme Court observes that officers who are invested with powers under Section 53 of the NDPS Act are ‘police officers’ within the meaning of Section 25 of the Evidence Act, 1872 (“**Evidence Act**”), and therefore, any confessional statement made to them would be barred under Section 25 of the Evidence Act from proving an offence against an accused.³

10. Therefore, legal effect of the statements recorded under Section 67 statements at the time of seizure to convict the accused under the NDPS Act has now been addressed as per the law laid down in *Tofan Singh* and we

any animal or conveyance which he has reason to believe to be liable to confiscation under this Act and any document or other article which he has reason to believe may furnish evidence of the commission of any offence punishable under this Act or furnish evidence of holding any illegally acquired property which is liable for seizure or freezing or forfeiture under Chapter VA of this Act; and

(d) detain and search, and, if he thinks proper, arrest any person whom he has reason to believe to have committed any offence punishable under this Act:

Provided that in respect of holder of a licence for manufacture of manufactured drugs or psychotropic substances or controlled substances granted under this Act or any rule or order made thereunder, such power shall be exercised by an officer not below the rank of sub-inspector:

Provided further that if such officer has reason to believe that a search warrant or authorisation cannot be obtained without affording opportunity for the concealment of evidence or facility for the escape of an offender, he may enter and search such building, conveyance or enclosed place at any time between sunset and sunrise after recording the grounds of his belief.

(2) Where an officer takes down any information in writing under sub-section (1) or records grounds for his belief under the proviso thereto, he shall within seventy-two hours send a copy thereof to his immediate official superior.

³ Para 158.1 of *Tofan Singh* (*supra*)

Section 25 - Confession to police officer not to be proved:

No confession made to a police officer shall be proved as against a person accused of any offence.



need not delve further into this issue.

11. Notwithstanding the above, the petition raises certain important concerns, particularly with respect to the practice of investigating agencies of citing witnesses giving incomplete particulars; who are not found at their stated address when summoned by the trial court as witnesses; leading to the inference that perhaps these witnesses were non-existent persons.

Directions

12. The very foundation of justice rests upon the principles of fairness, impartiality, and trust. There is a constitutional and a statutory mandate within which the Court gives a right to the accused to receive all documents and statements as well as to move an application for production of any record or witness in support of his case.⁴ This places an implied obligation upon the prosecution to furnish all relevant evidence/witnesses which have a bearing on the case, including a list of other materials, (such as statements, or objects/documents seized, but not relied on), to the accused⁵. This would grant the accused a fair and just opportunity to mount their defence. Practical implementation of these measures would go a long way to determine the true essence of justice delivered. Judicial oversight should play a more active role in monitoring the proceedings, particularly in cases involving potentially fictitious independent witnesses, and ensure that both the prosecution and defence remain vigilant and uphold the highest standards of justice. Our directions hereby aim to reinforce this principle and ensure a more transparent and reliable judicial process. We therefore

⁴ Sidhartha Vashisht @ Manu Sharma v. State, (2010) 6 SCC 1

⁵ In Re: To Issue Certain Guidelines Regarding Inadequacies and Deficiencies in Criminal Trials v. The State of Andhra Pradesh and Ors., Suo Moto Writ (CRL) No(s) 1/2017.



consider it appropriate to issue followings directions:

12.1 The charge sheet should clearly state the name, parentage and address of the independent witness, along with a photograph or photo identity card of the witness. This is a practice followed for sureties standing bail for accused persons. It is submitted by counsel for Respondent No. 1 that such practices have recently been adopted by various investigation agencies for NDPS cases as well. It must be ensured that such practices are continued to be adopted across board.

12.2 Efforts must be made to give full and fair disclosure in the charge sheet about the number of cases the 'independent witness' has previously appeared in as a witness to arrest and/or seizure, through reliance upon the database mentioned in sub-paragraph 5 below.

12.3 All independent witnesses must be made aware of their rights and responsibilities. They should be informed that they might be summoned by the court for cross-examination, and any discrepancies in their statements could lead to adverse implications.

12.4 Prosecution agencies must consider adopting digital means wherever possible. Wherever feasible, witnesses' statements could be recorded electronically, with timestamps and geotags to ensure authenticity. These digital records would serve as an added layer of security and transparency.

12.5 Investigating agencies must maintain a comprehensive digital database of all independent witnesses. This database should be periodically reviewed to identify patterns that might indicate the use of stock witnesses or other irregularities. Respondent No. 1 submits that although a welcome step, there may be procedural challenges in implementing the same. The importance of the presence of an accurate, comprehensive and up-to-date



database cannot be understated in curbing such aberrant practices. Therefore, we encourage the Respondents to explore feasible and practical solutions for maintaining such a database and direct them to implement the same in a time-bound manner.

13. By adopting the aforementioned suggestions and continuously refining the processes, we move closer to an ideal judicial system that upholds the highest standards of justice for all.

14. Disposed of, along with pending applications.

SANJEEV NARULA, J

SATISH CHANDRA SHARMA, CJ

SEPTEMBER 21, 2023

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