

IN THE HIGH COURT OF BOMBAY AT GOA**LD-VC-BA-24-2020**

Mr Ejiofor Emmanuel Idoko, Aged 32 years,
NIGERIAN National, Presently in Judicial custody
At Central Jail, Colvale, Colvale, Goa. ...Applicant

Versus

1. The State of Goa,
Through I.O., ANC Police Station,
Panaji, Goa.

2. Public Prosecutor,
Office of the Advocate General,
HC Building, Panaji, GOA. ... Respondents

Shri T. George John, Advocate for the Applicant.
Shri Gaurish Nagvekar, Additional Public Prosecutor for the Respondents.

Coram:- DAMA SESHADRI NAIDU, J.

Date:- 7th September 2020

P.C. :

Facts:

The applicant, a Nigerian, has been charged with the offence punishable under Section 21(c) of the NDPS Act, 1983. Post arrest, the applicant applied twice to the trial Court for bail, but on both occasions he could not succeed. So, now he has come before this Court.

2. As to the facts, on 10th October 2019, the staff of Anti-Narcotic Cell Police Station, Panaji, Goa, led by PSI Arun Dessai, along with two Panchas, conducted a narcotics raid. They caught the applicant and found him concealing 121.643 grams of suspected cocaine in his scooter. It is a commercial quantity, worth about Rs.12,16,000/-. The Anti-Narcotic Cell

registered Cr. No.18/2019 under Section 21 (c) of the NDPS Act and arrested the applicant on the same day.

Submissions:

Applicant:

3. Shri T. George, the learned counsel for the applicant, submits that the informant, PSI Mr Arun Dessai, carried out a part of investigation. So the principles of natural justice have been violated. Besides the informant and the officer that conducted the raid are of the same rank. That vitiates the entire investigation.

4. According to Shri George, guided by the Supreme Court's dictum in *Mohanlal v State of Punjab*¹, this Court must enlarge the applicant on bail. He also insists that the applicant was not given the benefit of Section 50 of the NDPS Act. Therefore, the Supreme Court's *Arif Khan v. State of Uttarakhand*² holding, too, aid the applicant. Apart from contending that the applicant is innocent, Shri George points out that the police completed the investigation and filed the charge sheet as well. Therefore, he urges this Court to enlarge the applicant on bail.

The Prosecution:

5. On the other hand, Shri Gaurish Nagvekar, the learned Additional Public Prosecutor, argues that the contraband is of commercial quantity. It therefore attracts Section 37 of the NDPS Act. He also points out that the applicant is a foreign national with no proper travel documents; should he be released on bail, he is bound to flee the process of the court.

6. The learned APP also asserts that PSI Manjunath Naik is the informant and PSI Arun Dessai is the officer that conducted the raid. And PSI Pritesh Madgaonkar is the investigating officer. According to him, the prosecution

¹(2018) 17 SCC 627

²(2018) 18 SCC 380

has breached in the applicant's case neither the law nor the precedent. Shri Nagvekar also points out that the chemical analysis of the contraband revealed that it is cocaine. In the end, he has submitted that the applicant is a professional drug peddler and has already involved in four crimes. Therefore, he urges this Court to dismiss the bail application.

7. Heard Shri T. George, the learned counsel for the applicant; and Shri Gaurish Nagvekar, the learned Additional Public Prosecutor.

Discussion:

8. The applicant is a foreigner with no proper travel documents. He was transporting a commercial quantity of cocaine. So he has been charged with the offence under Section 21(c) of the NDPS Act. The quantity of the contraband, indeed, attracts the rigours of Section 37 of the NDPS Act. And to top it all, he has already been involved in four crimes—two of them being under the NDPS Act.

9. But the applicant's counsel has raised certain objections and cited a couple of precedents for keeping his contentions afloat. In fact, Shri George's flagship precedent is *Mohan Lal*. As we shall see, *Mohan Lal* was decided on 16th August 2018. But after that, much decisional water has flowed under the judicial bridges. Now, *Mohan Lal*, a three-Judge Bench decision, stands overruled by *Mukesh Singh v. State (Narcotic Branch of Delhi)*³, a Constitutional Bench decision.

10. Let us, first, see *Mohan Lal*'s case holding. In this case, a three-Judge Bench has noticed a decisional cleavage between two co-ordinate Benches of two Judges. So, *Mohan Lal* considered it necessary to lay down the law with certainty. To leave the matter “for being determined on the individual facts of a case”, according to *Mohan Lal*, may not only lead to possible abuse of powers, but more importantly will leave the police, the accused, the lawyer, and the

³Decided on 31st August 2020

courts in a state of uncertainty and confusion. And it must be avoided.

11. In that backdrop, *Mohan Lal* (per Navin Sinha J), has held that a fair trial to an accused, a constitutional guarantee under Article 21 of the Constitution, would be a hollow promise if the investigation in an NDPS case were not to be fair or raised serious questions about its fairness. In a case of the reverse burden of proof, the onus will lie on the prosecution to demonstrate that the investigation was fair, judicious, and just. If the investigation itself is unfair, to require the accused to demonstrate prejudice will be fraught with danger. And such a course vests arbitrary powers in the police, leading to, at times, false implications. In that event, the investigation would become an empty formality and a farce.

12. According to *Mohan Lal*, in crimes under a statute with reverse onus, if the very informant police official is asked to investigate, serious doubts will naturally arise regarding his fairness and impartiality. It is not necessary that bias must actually be proved. Thus, fair investigation, which is the foundation of a fair trial, necessarily postulates that informant and investigator must not be the same person. Any possibility of bias or predetermined conclusion, *Mohan Lal* advocated, must be excluded.

13. Later, *Mohan Lal*'s case holding was reconsidered in *Varinder Kumar v. State of Himachal Pradesh*⁴, by a coequal Bench. *Varinder Kumar* has felt that the criminal justice delivery system should not veer exclusively towards the offender's benefit, thus the trial becoming a unidirectional exercise. So *Varinder Kumar* has not wanted *Mohan Lal* to become a springboard for an accused to catapult himself to acquittal, despite all other considerations. In the end, *Varinder Kumar* has declared the case holding of *Mohan Lal* to have only a prospective operation. That means, all the criminal prosecutions, trials, and

4(2020) 3 SCC 321

appeals pending before *Mohan Lal*'s verdict will "continue to be governed by the individual facts of the case".

14. *Mohan Lal*'s dictum doubted, another coequal Bench had it placed before a Constitution Bench in *Mukesh Singh*. It was decided on 31st August 2020. *Mukesh Singh*, per M. R. Shaj J, has exhaustively analysed the statutory scheme of NDPS Act and the relevant provisions of the Code of Criminal Procedure, the precedential position on the question involved in *Mohan Lal*. It has eventually held that *Mohan Lal* has not laid down the correct law. Thus, now, *Mohan Lal* stands overruled.

15. *Mukesh Singh* has held that the NDPS Act is a complete Code. According to it, Section 53 of the NDPS Act does not speak that "all those officers to be authorised to exercise the powers of an officer in charge of a police station for the investigation of the offences under the NDPS Act shall be other than those officers authorised under Sections 41, 42, 43, and 44 of the NDPS Act." In other words, the legislature in its wisdom has never thought that the officers authorised to exercise the powers under Sections 41, 42, 43 and 44 cannot be the officer in charge of a police station for the investigation of the offences under the NDPS Act. *Mukesh Singh*, in this context, has also taken aid of statutory presumption under the illustration (e) to Section 114 of the Indian Evidence Act.

16. *Mukesh Singh* has pointed out that "in the cases of reverse burden of proof, the presumption can operate only after the initial burden which exists on the prosecution is satisfied". Nor does the reverse burden merely exist in special enactments like the NDPS Act and the Prevention of Corruption Act; it is also a part of the IPC. It is evident from Section 304B and all such offences under the Penal Code. It has, then, held that the NDPS Act is "a special Act with special procedure to be followed under Chapter V". There is

no specific bar, *Mukesh Singh* emphasises, against the informant officer himself investigating. Besides, given the safeguard under Section 58 of the NDPS Act, “there cannot be any general proposition of law to be laid down that in every case where the informant is the investigator, the trial is vitiated and the accused is entitled to acquittal”.

17. To conclude, *Mukesh Singh* has held that the question of bias or prejudice would depend upon the facts and circumstances of each case. Therefore, merely because the informant is the investigator, by that itself the investigation would not suffer the vice of unfairness or bias. “The matter has to be decided on a case to case basis”. As a result, *Mukesh Singh* has declared *Mohan Lal* and other cases holding the contrary view as not good law and “specifically overruled” them.

18. When I heard the arguments in the last week of August, the learned APP informed me that *Mukesh Singh* was posted for judgment on 31st August. So the counsel on both sides agreed to await the Supreme Court's verdict. For the applicant, Mohan Lal was the fulcrum, and its precedential position was in peril. *Mukesh Singh* delivered, I reheard the counsel for the parties. This time, Shri George has given up his plea on the same officer being the informant and the investigator. Instead, he has contended that the informant and the investigator are of the same rank. Besides, he has contended that the investigator was a part of the team that conducted the raid.

19. According to Shri George, these two questions—that of both the informant and the investigator being the rank and that of the investigator being the part of the raiding team—have not been considered in *Mukesh Singh*. I am afraid that is, perhaps, a last-gasp argument. Once a Constitution Bench has emphatically held that the informant and the investigator can be the same person, those two persons holding the same rank and one participating in the

operation of the other hardly matters. Shri George's contention, having shades of *sub silentio*, deserves to be disregarded. It is disregarded.

20. Another argument Shri George has advanced is this: *Mukesh Singh* was decided on 31st August 2020. So the crimes registered before that date would not get affected by that verdict. I am afraid, this argument, too, must fail. Prospectivity and retrospectivity are the legislative devices, not precedential features. And "prospective overruling" or applying a precedent prospectively, as *Varinder Kumar* did, is a constitutional device, not a common-law canon. Whenever rendered, a decision takes precedential hold as if it were rendered on the day the statute was brought into force. A decision *per se* is not legislation; it only clarifies what the legislation has meant. And that clarification puts the statute in the interpretative light the Court has cast. It is as if there existed no ambiguity from the beginning. In other words, a judicial verdict from Constitutional Courts operates at two levels: (a) between the parties and (b) as a precedent.

21. As a verdict, it operates between the parties from the date the *lis* arose, though rendered at the end of the *lis*. As a precedent, it operates with no temporal constraints. I hasten to add the only exception: no precedent shall affect the rights of other persons whose litigation has already reached decisional finality.

22. Shri George had been, still, unrelenting; he cited a few more decisions and contended there have been procedural lapses, including those under Section 50 of the NDPS Act. Let me consider them. Incidentally, though the applicant's counsel has cited decisions on the consequence if Section 50 stands violated, the pleadings contained no details about the procedural violation.

23. In *State of Kerala v. Rajesh*⁵, from the accused the police allegedly recovered over 10 kg hashish oil and money. The accused was said to have entrusted the hashish oil to the co-accused for sale in the international market. Post-arrest, the Special Court refused the bail, but the High Court granted it. It rejected the prosecution's application under Section 482 Cr PC., to recall the bail order.

24. In the above context, the Supreme Court in *Rajesh* has held that Section 37 of the NDPS Act reveals that bail for an offence under that Act is not only subject to Section 439 of the CrPC but is also subject to Section 37, which commences with a non-obstante clause. For the Court to consider bail application, Section 37 requires two conditions fulfilled. One is that the prosecution must be allowed to oppose the application; the other is that the Court must be satisfied there are reasonable grounds for believing that he is not guilty of such offence. If either of these two conditions is not satisfied, the bar against bail operates.

25. The expression "reasonable grounds" means something more than prima facie grounds. Section 37 contemplates substantially probable causes for the Court to believe that the accused is not guilty of the alleged offence. The reasonable belief contemplated in the provision, according to *Rajesh*, requires the facts and circumstances sufficient to justify that the accused is not guilty of the alleged offence.

26. *State of Punjab v. Baljinder Singh*⁶ is a case in which a person was found to possess a vehicle-load of contraband. He was subjected to personal search. That personal search was not in conformity with Section 50 of the NDPS Act. But the vehicle search resulted in the recovery of contraband material, and it stood proved independently. Then, would the accused be

⁵AIROnline 2020 SC 67

⁶AIROnline 2019 SC 1246

entitled to the benefit of acquittal on the grounds of non-compliance with Section 50 of the Act even regarding the material found in the vehicle?

27. The Supreme Court has held, per Uday Umesh Lalit J, that merely because Section 50 was not followed during the 'personal search', the Court cannot extend any benefit to the accused by invalidating the independent recovery from the vehicle.

28. Let us move on to another case. In *Madan Lal v. State of H.P.*⁷, the Supreme Court has noted that Section 50 applies to the search of a person, not of a vehicle or a container or a bag or premises. On the question of possession, the Court has held that it is a polymorphous term. It assumes different colours in different contexts.

29. On facts, in *Madan Lal*, two persons, supposedly strangers, were travelling in a private vehicle. The two persons were found to have known each other. How they travelled together from the same destination in a private vehicle, they did not explain. Then, the presumption under S. 35 would apply. The driver, too, could not be spared because the logic that applied to the other accused would apply to the driver as well. It assumes different colours in different contexts. In *Ishwar Buddha v. State of Goa*⁸, charas weighing 1.115kgs was seized from the bag carried by the accused. To be more precise, the contraband was found in her shoulder bag, not on her person *per se*. So this Court has held that Section 50 does not apply.

30. In *State of Rajasthan v. Parmanand*⁹, a three-Judge Bench of the Supreme Court has held that if the police searched merely a bag carried by a person, Section 50 of the NDPS Act would not apply. Instead, if the police search both the bag and the person himself, Section 50 applies. Usually, the

⁷AIR 2003 SC 3642

⁸AIR Online 2019 Bom 1517

⁹AIR 2014 SC 1384

accused must be given the option to be searched before a Gazetted Officer or a Magistrate. But in *Parmanand*, the accused were given a third option: to be searched before the superintendent, who was a part of the raiding party. This option, the Supreme Court has held, would frustrate Section 50(1); the search, thus, stood vitiated.

31. In *Arif Khan*, the raiding party intercepted the petitioner and asked him whether he was carrying any contraband. The petitioner was said to have admitted that he was carrying “charas”. After apprehending the petitioner, the police informed him that he had a legal right to be searched in the presence of a gazetted officer or a Magistrate. But the petitioner replied that he had faith in the raiding police party and consented to be searched by them. The trial Court and the High Court were satisfied with this version and refused bail. In this context, a two-Judge Bench of the Supreme Court, per Abhay Manohar Sapre J, has held that to make the search and recovery of the contraband articles from the suspect’s body, the search and recovery must comply with the requirements of Section 50 of the NDPS Act. That is, it is mandatory for the prosecution to prove that the search and recovery were made from the appellant in the presence of a Magistrate or a gazetted officer. Thus, *Arif Khan* has disregarded the petitioner’s alleged consent to be searched.

32. As I have already noted, the applicant has not, before this Court, contended there was any bodily search. What was searched was the scooter, and the contraband was found in the scooter.

33. Finally, we may consider *Union of India v. Shiv Shanker Kesari*¹⁰, the respondent was charged with the offence punishable under Sections 8, 15, 27A and 29 of the NDPS Act, 1985. The police alleged that the raiding party seized nearly 400 Kg. of poppy straw from the respondent. The respondent arrested, the trial Court refused bail. The High Court granted it. It was on the

¹⁰JT 2007 (11) SC 201

grounds that the recovery was not from the respondent's exclusive possession and that other members of the family, too, were involved. The High Court has also noted that the respondent had no criminal history.

34. In this context, the Supreme Court has held that courts can grant bail on the fulfillment of two conditions: (i) where there are reasonable grounds for believing that the accused is not guilty of the offence; (ii) where he is not likely to commit any offence while on bail. On facts, the Supreme Court has observed that the High Court, while accepting the prayer for bail, has recorded no finding that there are reasonable grounds for believing that the accused was not guilty. Further, no finding has been recorded that he is not likely to commit any offence while on bail. In this process, it has also examined the semantic and legal significance of the expression "reasonable" as used in Section 37 of the NDPS Act.

Conclusion:

As held in *Shiv Shanker Kesari*, I have not found the applicant's establishing any ground that would mitigate the rigours of Section 37 of the Act. So I dismiss the Bail Application.

DAMA SESHADRI NAIDU, J.

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