

(2020) 07 SHI CK 0106

In the High Court Of Himachal Pradesh

Case No : Criminal Miscellaneous Petition (M) No. 992 Of 2020

Prem Roka

APPELLANT

Vs

State Of H.P

RESPONDENT

Date of Decision : 20-07-2020

Acts Referred:

Constitution Of India, 1950 — Article 21
Narcotic Drugs And Psychotropic Substances Act, 1985 — Section 20, 37
Code Of Criminal Procedure, 1973 — Section 2(d), 161

Citation : (2020) 07 SHI CK 0106

Hon'ble Judges : Jyotsna Rewal Dua, J

Bench : Single Bench

Advocate : Virender Singh Chauhan, Vivek Darhel, Anil Jaswal, Manoj Bagga, Surjeet Singh, Sudesh Kumar

Final Decision : Disposed Of

Judgement

Jyotsna Rewal Dua, J

1. On the strength of judgment, passed by Hon'ble Apex Court in (2018)17 Supreme Court Cases 627, titled Mohan Lal versus State of Punjab, petitioner seeks regular bail alleging that Investigating Officer and the complainant in the FIR in question is the same person.

2. The point raised is being looked at this stage for the limited purpose of finding whether there are reasonable grounds to believe that the petitioner is not guilty of possessing commercial quantity of contraband for considering grant of bail to him under the parameters of Section 37 of the Narcotic Drugs and Psychotropic Substances Act, 1985 (in short 'NDPS Act'). Relevant facts for the purpose of adjudicating instant bail petition are noticed hereinafter:

2(i). On 27.4.2019 at about 4:05 P.M., Sub Inspector Surjeet Singh (Investigating Officer), HHC Inder Singh and C. Rajender Singh were present on patrolling duty at NH-05, Narail Ravinda road at Theog, District Shimla.

2(ii). At that time, vehicle bearing No. HP-03-3501 came towards the spot from Matiana side. It was stopped by the police party. The vehicle had two occupants. On inquiry, they disclosed their names as Anil Kumar and Rajender Kumar.

2(iii). While inquiry was being made from the occupants of the above mentioned vehicle, the police party noticed a pedestrian coming from Matiana side. On seeing the police party, this person suddenly re-traced his steps and started running towards that very side from where he had come. Becoming suspicious, police personnel chased and nabbed him. He gave his name as Prem Roka (bail petitioner). A yellow coloured carry bag, held by him in his right hand, was searched in presence of Anil Kumar and Rajender Kumar (occupants of vehicle No. HP-03-3501), who were associated as independent witnesses. Black colored substance was found inside a polythene kept in the carry bag, which on the basis of experience of the police personnel, was determined as cannabis. It weighed 1.500 Kg. on the weighing scale of the I/O kit.

2(iv). The recovered cannabis was placed back in the same carry bag and kept in a piece of cloth. It was sealed with nine impressions of seal 'A'. The specimen of seal 'A' was taken on a cloth. It was embossed on form NCB - I, filled in triplicate. The seal thereafter was handed over to HHC Inder Singh. Furd was prepared on the spot, which was signed by the petitioner and independent witnesses Anil Kumar and Rajinder Kumar as well as by witness HHC Inder Singh. The case property (recovered contraband) was taken into possession. The petitioner was found to be in conscious possession of 1.500Kg. of cannabis in violation of Section 20 of the NDPS Act. Therefore, Rukka was prepared on the spot by Sub Inspector Surjeet Singh (I.O.).

2(v). The Rukka so prepared by Sub Inspector Surjeet Singh (I.O.) alongwith case property, specimen seal, NCB-I form was brought to the Police Station, Theog, by Constable Rajender Singh.

2(vi). The SHO, Police Station, Theog found nine impressions of seal 'A' intact on the cloth parcel. He re-sealed the same with six impressions of seal 'S'. The specimen of seal 'S' was taken on a separate piece of cloth. Columns in form NCB-I were completed and re-sealing certificate was issued. Re-sealed parcel, form NCB-I and the certificate were thereafter handed over to Malkhanna. FIR No. 71/2019 under Section 20 of the NDPS Act was registered by SHO, Police Station, Theog, District Shimla. For investigation of the case, HC Sudesh Kumar was deputed and sent to the spot.

2(vii). HC Sudesh Kumar reached the spot for carrying out the investigation. He met the police party, accused and witnesses already present there. On the identification of Sub Inspector Surjeet Singh, the spot was inspected and spot map was prepared by I.O. Sudesh Kumar. He recorded the statements of witnesses and other officials under Section 161 of Code of Criminal Procedure including the statement of S.I. Surjeet Singh. He also interrogated the petitioner. Entire investigation in the case thereafter also was carried out only by HC Sudesh

Kumar. The petitioner was got medically examined from Civil Hospital, Theog. MLC in this regard was obtained. Petitioner was produced before learned Additional Chief Judicial Magistrate, Theog on 28.4.2019. He is in custody ever since 27.4.2019. As per report of State Forensic Science Laboratory, Junga (in short "SFSL"), the recovered contraband was cannabis.

2(viii). According to the status report, challan has been presented on 21.8.2019 before learned Sessions Judge, Shimla. Trial of the case is presently going on. Eight witnesses have already been examined and statement of remaining seven witnesses is yet to be recorded.

3. Contentions.

3(i). Shri Virender Singh Chauhan, learned Senior Counsel for the petitioner assisted by Mr. Vivek Derhal, Advocate has prayed for release of the petitioner on bail on the ground that the investigation in the instant case was carried out by Sub Inspector Surjeet Singh, who was also the complainant in the FIR in question. Relying upon following para of (2018) 17 Supreme Court Cases 627, titled Mohan Lal Versus State of Punjab, learned Senior Counsel argued that a complainant in the FIR cannot himself be the Investigating Officer:

" 30. 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."

Learned Senior counsel further contended that in the instant case almost entire investigation had been carried out by Sub Inspector Surjeet Singh, who himself was the complainant in the FIR. This procedure according to learned Senior Counsel breached the mandate in Mohan Lal's case (supra) entitling the petitioner to be released on bail.

3(ii). Shri Anil Jaswal, learned Additional Advocate General vehemently opposed the plea raised by the petitioner. He submitted that present was not a case of any prior information for the police party or for the Investigating Officer, Sub Inspector Surjeet Singh. While present on the spot, police party became conscious of the activities of the petitioner, therefore, chased and nabbed him. Search was carried out in accordance with law leading to recovery of contraband

from him. SI Surjeet Singh cannot be termed as an informant. Learned Additional Advocate General also urged that in the facts and circumstances of the case, SI Surjeet Singh though recorded as complainant in the FIR in question, could not be debarred from carrying out the preliminary investigation required on the spot by nabbing the petitioner and effecting his search in accordance with law, which led to recovery of the contraband in question. Further investigation after receipt of Rukka and the case property at Police Station, was carried out not by SI Surjeet Singh but by HC Sudesh Kumar. Statements of witnesses, officials, petitioner and of SI Surjeet Singh (I.O) under Section 161 Cr.P.C. were recorded by HC Sudesh Kumar (I.O.). Spot was inspected and map was prepared by HC Sudesh Kumar.

Entire emphasis of submissions advanced by learned Additional Advocate General is that from the time of receipt of Rukka at Police Station and from the time of registration of FIR in the Police Station, Theog, investigation in the case was carried out by another I.O. i.e. H.C. Sudesh Kumar. Therefore, he contends that there was no infraction in the instant case of the mandate of Hon'ble Apex Court in Mohan Lal's case (supra). He has also referred to following paras of Mukesh Singh vs. State (Narcotic Branch of Delhi), Case No. 39528 of 2018, where on 17.1.2019 a division bench of Hon'ble Apex Court expressing disagreement with the view in Mohan Lal's case has requested for referring the matter to a larger Bench:

"[8] Having considered the submissions and the cases referred to in the judgment in Mohan Lal (Supra) as well as other cases, in our considered view, the matter requires consideration by a Bench of three Hon'ble Judges.

[9] We may prima facie express that we find it difficult to accept the view taken in Mohan Lal (Supra). Some of the decided cases have maintained a distinction in that where the investigation was conducted by the informant himself, appropriate weightage was given while appreciating the evidence. In a given case, where the complainant himself had conducted investigation, such aspect of the matter can certainly be given due weightage while assessing the evidence on record but it would be completely a different thing to say that the trial itself would be vitiated for such infraction. But Mohan Lal (Supra) has ruled that the trial itself would stand vitiated on that count.

[10] Since we are in respectful disagreement with the view taken in Mohan Lal (Supra), this matter may require consideration by a Bench of at least three Hon'ble Judges. We, therefore, direct the Registry to place the papers before the Hon'ble the Chief Justice of India to constitute a Bench of appropriate strength to consider the matter."

4. Observations.

Legal Position.

4(i). In Mohan Lal's case (supra) Hon'ble Apex Court held that a fair investigation

is the very foundation of fair trial which necessarily postulates that the informant and the investigator must not be the same person since justice should not only be done but should appear to have been done. This requirement is imperative in laws including NDPS Act, which carry reverse burden of proof.

4(ii). In *Varinder Kumar vs. State of Himachal Pradesh* reported in 2020 (3) SCC 321, Hon'ble Supreme Court held that law laid down in *Mohan Lal* (supra) will not be allowed to become a spring board for acquittal in prosecutions prior to the same, irrespective of all other considerations. In the present case the date of incident and of registration of FIR is 27.4.2019 i.e. after the pronouncement of verdict by the Hon'ble Apex Court in *Mohan Lal's* case on 16.8.2018.

4(iii). In *Mohan Lal's* case (supra), Hon'ble Apex Court while holding in the operative part of the judgment (already extracted above) that informant and the investigator must not be the same, also observed in paras/13 & 14 that a fair trial to an accused, is a constitutional guarantee under Article 21 of the Constitution of India. In the nature of reverse burden of proof, the onus will be on the prosecution to demonstrate that the investigation was fair, judicious, with no circumstances which may raise doubts about its veracity. Investigation into a criminal offence must be free from objectionable features or infirmity which may legitimately lead to a grievance on the part of the accused that the investigation was unfair and carried out with an ulterior motive.

4(iv). In *Mohan Lal's* case (supra), the FIR was lodged by Sub Inspector Chand Singh (PW1) in respect of events happened while he was on patrolling duty alongwith other police officials. Search was carried out by PW1. Rukka was prepared by him. On the basis of the Rukka, FIR was lodged. Investigation was also handed over to PW1 Chand Singh. Upon conclusion of the investigation, the accused therein was charge-sheeted and put on trial. Various flaws in the investigation, so carried out by PW1 Chand Singh, who was also the complainant, were noticed by Hon'ble Apex Court in the judgment viz (a) Seized narcotics were neither deposited by PW1 in Malkhanna nor any entry was made in roznamcha. (b) sample was retained by PW1 in his private custody in a rented accommodation. (c) The case property was retained by PW1 Chand Singh (I.O.) in his possession. (d) There was an unexplained delay of nine days in sending the sample for chemical analysis. (e) PW1 (I.O.), Darshan Singh (independent witness) and ASI Balwinder Singh (who was handed over the specimen seal) were not examined despite service of summons on the official witnesses and issuance of bailable warrants (affirmed in *Mohan Lal's* case) against the private witness. In their absence, consent memo and seal could not be said to have been proved.

After observing above and various other flaws in the investigation so carried out by I.O./complainant/PW1 Chand Singh, Hon'ble Apex Court observed in *Madan Lal's* case that had the Investigator been different from the complainant, issues for consideration would have been different. Also, it was observed that 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 forgone conclusion.

4(v). In *Megha Singh vs State of Haryana*, reported in (1996)11 SCC 709 Hon'ble Apex Court observed that the Head Constable, who was the de-facto complainant, had himself investigated the case and this affects impartial investigation. HC who arrested the accused, conducted the search, recovered the pistol and on his complaint FIR was lodged and the case was initiated. Later, he himself recorded the statements of witnesses under Section 161 Cr.P.C. as part of the investigation. This aspect may not be resorted to as it may affect fair and impartial investigation.

4(vi). (2010) 15 SCC 369, titled *State of Tamil Nadu vs. Rajangam* (affirmed in *Mohan Lal's case*), Hon'ble Apex Court relied upon the ratio of *Megha Singh's case* (supra) in approving the view of Madras High Court given in *Balasundaran's vs State*, 1999 SCC OnLine Mad 1130. *Rajangam's* was a case where crime was registered by PW6 and the case was also investigated by him. The question before the Court was 'whether PW6, who registered the crime, should have investigated the case or the independent officer ought to have investigated the case'. Relying upon *Megha Singh's case* (supra) the view of the High Court in the judgment impugned therein was up-held that officer who registered the case should not have proceed with the investigation of the case. Following view of the Madras High Court in *Balasundaran v. State*, 1999 SCC OnLine Mad 1130 was also noticed:

"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."

Investigating Officer in the above referred case was the same person (PW5) who had nabbed and searched the accused on the spot. Entire investigation including examination of witnesses was carried out by this very I.O./PW5. It was only the

challan which was presented by the successor to the PW5. There was no material to show that the successor to PW5 had examined any witness. Therefore, it was held in the case that the entire investigation in the case was actually carried out by PW5, who was present at the time of the search.

4(vii) State of H.P. vs. Atul Sharma, 2015(2) Shim.LC 693, the facts of the case were that the investigation had been conducted by the complainant himself. There was no evidence on record to prove that investigation was handed over to some other Investigating Officer. Therefore, the investigation conducted by the complainant was held to be fatal to the prosecution. Relevant para from the judgment is extracted hereinafter:

"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. Entire investigation by complainant himself was deprecated by Hon'ble Apex Court of India in case reported in AIR 1976 SC 985 titled Bhagwan Singh vs. The State of Rajasthan. (Also see:1993 Criminal Law Journal 3716 titled Gyan Chand vs. State of Rajasthan)."

4(viii) In the backdrop of above legal position, examination of facts of the case for limited purpose and at this stage:

4(viii)(a) At this stage, in the instant case, it is not the case of the petitioner that the Investigating Officer was the informant. It is also not the case of the petitioner that the Investigating Officer had any previous information. It was a case of chance recovery at the spot. Certain suspicious actions of the accused (petitioner) had caught the eye of the patrolling party comprising of Sub Inspector Surjeet Singh (Investigating Officer), HHC Inder Singh and C. Rajender Singh, who were present on the routine patrolling duty. Accused/petitioner was trying to escape from the spot. He was chased and nabbed by the police personnel. His search was carried out, allegedly in accordance with law. During search 1.500 Kg. cannabis was recovered allegedly from a bag held by the petitioner. The procedure required to be followed during search was allegedly adhered to. Independent witnesses were allegedly associated. In fact, no grievance on these aspects has even been raised by learned Senior Counsel for the petitioner at this stage. Rukka along with case property and documents was handed over to the SHO, Police Station, Theog by C. Rajender Singh. After registration of the FIR, the investigation of the case was handed over by SHO, Police Station, Theog to I.O. Sudesh Kumar. Therefore, at this stage present cannot be said to be a case where the informant was the complainant. Present is

also not a case where the complainant himself was the Investigator. Complainant was Sub Inspector Surjeet Singh and investigation in the matter after registration of FIR was carried out by Sudesh Kumar.

4(viii)(b) Perusal of the record produced by the State reveals that post receipt of Rukka and case property at Police Station, Theog, the FIR was registered by SHO, Theog. Complainant in the FIR was SI Surjeet Singh Patial. HC Sudesh Kumar was assigned the duty to investigate the case.

4(viii)(c) Post registration of FIR, entire investigation of the case was carried out by H.C. Sudesh Kumar. He also recorded the statements under Section 161 Cr.P.C. of HHC Inder Singh, C. Rajender Singh, witnesses Anil Kumar and Rajinder Kumar as well as of SI Surjeet Singh on 27.4.2019 itself. He also prepared the spot map. During the course of the investigation, he also recorded statements under Section 161 Cr.P.C. of HC Het Ram, HC Mohar Singh, C. Naveen Negi, C. Rajesh Kumar, HC Praveen Kumar, SDPO Kulwinder Singh and C. Ashwani Dogra on different dates. He also got conducted the medical examination of the petitioner and obtained the SFSL report with respect to the contraband.

Suffice to say at this stage that entire investigation post receipt of Rukka and after the registration of FIR at Police Station, Theog was carried out only by HC Sudesh Kumar.

Therefore, present is not a case where complainant himself was the Investigator.

5. From the above factual discussion, following facts emerge at this stage:-

5(i). A police party headed by SI Surjeet Singh, while present on spot on routine patrolling duty, had nabbed the petitioner. His search allegedly led to recovery of the contraband. Procedure in accordance with law was allegedly followed during search and seizure. Rukka along with case property and requisite documents was sent to Police Station, Theog through Constable Rajender Singh. In the Rukka itself request was made by its author SI Surjeet Singh for deputing another I.O. to the spot while informing that police patrolling party were waiting there for the arrival of the I.O.

5(ii). Post receipt of the Rukka and registration of the FIR, at Police Station, Theog, HC Sudesh Kumar was deputed by the SHO as Investigating Officer. He after arrival at the spot allegedly recorded the statements of members of the police patrolling party under Section 161 Cr.P.C. including that of SI Surjeet Singh, petitioner and all the witnesses. He prepared the spot map. During further investigation carried out by him over a period of time, he also recorded the statements of various other officials under Section 161 Cr.P.C., obtained MLC of the accused/ petitioner and the SFSL report.

5(iii). Therefore, facts as have come out at this stage are that in the instant case complainant SI Surjeet Singh was not the informant and he was also not the Investigator.

5(iv) Section 2(d) of the Cr.P.C. defines the complaint as:

"complaint" means any allegation made orally or in writing to a Magistrate, with a view to his taking action under this Code, that some person, whether known or unknown, has committed an offence, but does not include a police report.

Explanation:- A report made by a police office in a case which discloses after investigation, the commission of a non-cognizable offence shall be deemed to be a complaint; and the police office by whom such report is made shall be deemed to be the complainant.

In view of the explanation to the Section, the Officer who seized the article, lodged the report shall be deemed to be the complainant. In the case in hand SI Surjeet Singh was recorded as complainant in the FIR only because he as the head of the police patrolling party had carried out the search, seized the contraband, prepared and sent the Rukka along with requisite documents to Police Station, Theog. Post registration of the FIR, every step of the investigation thereafter was carried out by HC Sudesh Kumar and not by the complainant SI Surjeet Singh. Point is answered accordingly.

Present is a case where petitioner has been accused of possessing 1.500 K.grams of cannabis, which is commercial quantity notified under the NDPS Act. Apart from the plea raised and adjudicated above, no other grounds have been taken for grant of bail under Section 37 of the NDPS Act. It is worth noticing that on the grounds raised in the instant bail petition, petitioner had not even prayed at appropriate stage for quashing of the criminal proceedings, in which, now in the ongoing trial, out of fifteen witnesses, statements of eight witnesses stand recorded.

There is no merit in the instant bail petition. Same is accordingly dismissed.

Normally in bail petition facts of the case in detail are not required to be ventured into. However, in the instant case, a specific question insistently raised at this very stage, has been looked into for limited purpose of finding out whether there are reasonable grounds to believe at this stage that the accused is not guilty of possessing commercial quantity of contraband for considering his release on bail under Section 37 of NDPS Act.

It is further clarified that the observations and findings given above may not be equated with the one which is to be recorded at the end of the trial. It shall be open for the petitioner to take up all pleas available to him in accordance with law including the plea of bias, prejudice, non-compliance with statutory provisions etc. during the trial. Learned trial Court will adjudicate the matter on merits in accordance with law without being influenced by above observations.

With the above observations, the petition is disposed of.